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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
042	Letter	[Draft letter] [16 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] - To: Bob Graham - From: Daniel Bryant	16	N.D.	
043	Letter	[Draft letter] [16 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] - To: Bob Graham - From: Daniel Bryant	16	N.D.	
044	Draft	Draft Testimony, Attorney General John Ashcroft [5 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	5	09/23/2001	
045	Draft	[Draft provisions] [6 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	6	N.D.	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Anti-Terrorism Legislation [3]

FRC ID:

9121

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

① change in sdd just as
consell before Sept 11

The Honorable Bob Graham
Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Senator Graham:

I am writing to relay to you the views of the Department of Justice on the constitutionality of amending the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1800-1863 (FISA), so that a search may be approved when the collection of foreign intelligence is a purpose of the search. In its current form, FISA requires that the purpose of the search be for the collection of foreign intelligence. 50 U.S.C. § 1804(a)(7)(B) and 50 U.S.C. § 1823(a)(7)(B). We believe that this amendment would not violate the Fourth Amendment.

It should be made clear at the outset that the proposed FISA amendment cannot cause a facial violation of the Fourth Amendment. Because a purpose would include the current warrant applications in which foreign intelligence is the purpose of the search, a significant class of valid searches would continue to fall within the new statutory language. ~~It may be the case that some warrant applications—for example, those instances where criminal investigation constitutes an overwhelming purpose of the surveillance—will be rejected by the FISA court. In those situations, the FISA amendment would not be unconstitutional, so much as the Court would be construing the statute, according to the canon that statutes are to be read to avoid constitutional problems, so as not require the issuance of a warrant that would go beyond the Fourth Amendment. In other words, the proposed amendment cannot violate the Fourth Amendment because it would simply allow the Department to apply for FISA warrants up to the limit permitted by the Constitution, as determined by the FISA court. Amending FISA merely gives the Department the full flexibility to conduct foreign intelligence surveillance that is permitted by the Constitution itself. -- even if a court were to find the new standard problematic which we do not believe a court would or should.~~

I

The Fourth Amendment declares that, the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. U.S. Const. Amend. IV (emphasis added). The Amendment also declares that no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. Id.

Thus, the touchstone for review is whether a search is reasonable. See, e.g., *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) (the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a government search is 'reasonableness'). When law enforcement undertakes a search to discover evidence of criminal wrongdoing, the Supreme Court has said that reasonableness generally requires a judicial warrant. See *id.* at 653. But the Court has made clear that a warrant is not required for all government searches. A warrantless search can be constitutional when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. Id.

As a result, the Court properly has found a variety of warrantless government searches to be consistent with the Fourth Amendment. See, e.g., *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam) (certain automobile searches); *Acton, supra* (drug testing of high school athletes); *Michigan v. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (drunk driver checkpoints); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (drug testing of railroad personnel); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (random drug testing of federal customs officers); *United States v. Place*, 462 U.S. 696 (1983) (temporary seizure of baggage); *Michigan v. Summers*, 452 U.S. 692 (1981) (detention to prevent flight and to protect law enforcement officers); *Terry v. Ohio*, 392 U.S. 1 (1968) (temporary stop and limited search for weapons).

In these circumstances, the Court has examined several factors to determine whether a warrantless search is reasonable.

As the Court stated just last Term: When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable. *Illinois v. McArthur*, 121 S. Ct. 946, 949 (2001). In creating these exceptions to its warrant requirement, the Court has found that, under the totality of the

circumstances, the importance of the government's interests has outweighed the nature and the quality of the intrusion on the individual's Fourth Amendment interests. See *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

Of particular relevance here, the Court has found warrantless searches reasonable when there are exigent circumstances, such as a potential threat to the safety of law enforcement officers or third parties. The Court has also recognized that a government official may not need to show the same kind of proof to a magistrate to obtain a warrant for a search unrelated to the investigation of a crime as one must who would search for the fruits or instrumentalities of crime.

Camara v. Municipal Court of San Francisco, 387 U.S. 523, 538 (1967). For example, where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. *Id.* See also *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (in context of seizure and exigent circumstances, Fourth Amendment would permit appropriately tailored roadblock to thwart an imminent terrorist attack or catch a dangerous criminal who is likely to flee).

II

(NO) This analysis of Fourth Amendment doctrine demonstrates that the government could conduct searches to obtain foreign intelligence without ~~satisfying all of the requirements applicable in the normal law enforcement context. It is important to understand the current shape of Fourth Amendment law, and how it would apply to the circumstances at hand, in order to evaluate the constitutionality of the proposed amendment to FISA~~ the need to show probable cause and obtain a search warrant. As we have noted earlier, the Fourth Amendment's reasonableness test for searches generally calls for a balancing of the government's interest against the individual's Fourth Amendment interests. Here, the nature of the government interest is great. In the counter-intelligence field, the government is engaging in electronic surveillance in order to prevent foreign powers or their agents from obtaining information or conducting operations that would directly harm the security of the United States.

To be sure, the Supreme Court has subjected counter-intelligence searches of purely domestic terrorist groups to a warrant requirement. When it first applied the Fourth Amendment to electronic surveillance, the Supreme Court specifically refused to extend its analysis to include domestic searches that were conducted for national security purposes. *Katz v. United States*, 389 U.S. 347, 358 n. 23 (1967); see also *Mitchell v.*

Forsyth, 472 U.S. 511, 531 (1985). Later, however, in *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 299 (1972) (✖ Keith ✖), the Court held that the warrant requirement should apply to cases of terrorism by purely domestic groups. In doing so, the Justices framed the question by explaining that, ✖ [i]ts resolution is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion.✖ *Id.* While acknowledging that ✖ unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered,✖ *id.* at 312, the Court cautioned that ✖ [t]he danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.✖ *Id.* at 314. As a result, the Court held that the absence of neutral and disinterested magistrates governing the reasonableness of the search impermissibly left ✖ those charged with [the] investigation and prosecutorial duty [as] the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.✖ *Id.* at 317.

(yes) The Court explicitly noted, however, that it was not considering the scope of the President's surveillance power with respect to the activities of foreign powers within or without the country. *Id.* at 308. And after the Keith decision, lower courts have found that when the government conducts a search, for national security reasons, of a foreign power or its agents, it need not meet the same requirements that would normally apply in the context of a search of United States citizens who are not foreign agents or for criminal law enforcement purposes. In *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), for example, the Fourth Circuit observed that ✖ the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following Keith, 'unduly frustrate,' the President in carrying out his foreign affairs responsibilities.✖ *Id.* at 913. The Court based this determination on a number of factors, including:

- (1) ✖ [a] warrant requirement would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations,✖ *id.*;

(2) ❖ the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance Few, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States or the 'probable cause' to demonstrate that the government in fact needs to recover that information from one particular source,❖ *id.* at 913-14; and

(3) the executive branch ❖ is also constitutionally designated as the pre-eminent authority in foreign affairs.❖ *Id.* at 914.

The Court also recognized, however, that ❖ because individual privacy interests are severely compromised any time the government conducts surveillance without prior judicial approval, this foreign intelligence exception to the Fourth Amendment warrant requirement must be carefully limited to those situations in which the interests of the executive are paramount.❖ *Id.* at 915. See also *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); *United States v. Buck*, 548 F.2d 871 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977); *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971).

Therefore, the Fourth Circuit held that the government was relieved of the warrant requirement when (1) the object of the search or surveillance is a foreign power, its agent or collaborators since such cases are ❖ most likely to call into play difficult and subtle judgments about foreign and military affairs,❖ 629 F.2d at 915; and (2) ❖ when the surveillance is conducted 'primarily' for foreign intelligence reasons because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.❖ *Id.*

The factors favoring warrantless searches for national security reasons may be even more compelling under current circumstances than at the time of these lower court decisions. After the attacks on September 11, 2001, the government interest in conducting searches related to fighting terrorism is perhaps of the highest order -- the need to defend the nation from direct attack. As the Supreme Court has said, ❖ It is 'obvious and

unarguable' that no governmental interest is more compelling than the security of the nation.❖ *Haig v. Agee*, 453 U.S. 280, 307 (1981). The compelling nature of the government's interest here may be understood in light of the Founders' express intention to create a federal government ❖ cloathed with all the powers requisite to the complete execution of its trust.❖ The *Federalist* No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961). Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution's adoption, because ❖ the circumstances which may affect the public safety❖ are not reducible within certain determinate limits,❖

it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter ❖ essential to its efficacy.

Id. at 147-48.¹ Within the limits that the Constitution itself imposes, the scope and distribution of the powers to protect

¹See also *The Federalist* No. 34, at 211 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (Federal government is to possess ❖ an indefinite power of providing for emergencies as they might arise❖); *The Federalist* No. 41, at 269 (James Madison) ("Security against foreign danger is one of the primitive objects of civil society. . . . The powers requisite for attaining it, must be effectually confided to the federal councils.❖") Many Supreme Court opinions echo Hamilton's argument that the Constitution presupposes the indefinite and unpredictable nature of ❖ the circumstances which may affect the public safety,❖ and that the federal government's powers are correspondingly broad. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981) (noting that the President ❖ exercis[es] the executive authority in a world that presents each day some new challenge with which he must deal❖); *Hamilton v. Regents*, 293 U.S. 245, 264 (1934) (Federal government's war powers are ❖ well-nigh limitless❖ in extent); *Stewart v. Kahn*, 78 U.S. (11Wall.) 493, 506 (1870) (❖ The measures to be taken in carrying on war . . . are not defined [in the Constitution]. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution.❖); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1870) (❖ The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.❖).

national security must be construed to authorize the most efficacious defense of the nation and its interests in accordance with the realistic purposes of the entire instrument. *Lichter v. United States*, 334 U.S. 742, 782 (1948). Nor is the authority to protect national security limited to that necessary to victories in the field. *Application of Yamashita*, 327 U.S. 1, 12 (1946). The authority over national security carries with it the inherent power to guard against the immediate renewal of the conflict. *Id.*

The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies. Intelligence gathering is a necessary function that enables the President to carry out that authority.

The Constitution, for example, vests in the President the power to deploy military force in the defense of United States by the Vesting Clause, U.S. Const. Art. II, § 1, cl. 1, and by the Commander in Chief Clause, *id.*, § 2, cl. 1.² Intelligence operations, such as electronic surveillance, ~~very well may be often are~~ necessary and proper for the effective deployment and execution of military force against terrorists. Further, the Constitution makes explicit the President's obligation to safeguard the nation's security by whatever lawful means are

²See *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (President has authority to deploy United States armed forces abroad or to any particular region); *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual); *Loving v. United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (The inherent power of the Commander in Chief are clearly extensive); *Maul v. United States*, 274 U.S. 501, 515-16 (1927) (Brandeis & Holmes, JJ., concurring) (President may direct any revenue cutter to cruise in any waters in order to perform any duty of the service); *Commonwealth of Massachusetts v. Laird*, 451 F.2d 26, 32 (1st Cir. 1971) (the President has power as Commander-in-Chief to station forces abroad); *Ex parte Vallandigham*, 28 F.Cas. 874, 922 (C.C.S.D. Ohio 1863) (No. 16,816) (in acting under this power where there is no express legislative declaration, the president is guided solely by his own judgment and discretion); *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 6 (1992) (Barr, A.G.).

available by imposing on him the duty to take Care that the Laws be faithfully executed. Id., § 3. The implications of constitutional text and structure are confirmed by the practical consideration that national security decisions often require the unity in purpose and energy in action that characterize the Presidency rather than Congress.³

Judicial decisions since the beginning of the Republic confirm the President's constitutional power and duty to repel military action against the United States and to take measures to

³As Alexander Hamilton explained in *The Federalist* No. 74, [o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. *The Federalist* No. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). And James Iredell (later an Associate Justice of the Supreme Court) argued in the North Carolina Ratifying Convention that [f]rom the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, despatch, and decision, which are necessary in military operations, can only be expected from one person. Debate in the North Carolina Ratifying Convention, in 4 Jonathan Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 107 (2d ed. Ayer Company, Publishers, Inc. 1987) (1888). See also 3 Joseph Story, *Commentaries on the Constitution* § 1485, at 341 (1833) (in military matters, [u]nity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when single magistrate is entrusted exclusively with the power).

prevent the recurrence of an attack. As Justice Joseph Story said long ago, [i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are now found in the text of the laws. *The Apollon*, 22 U.S. (9 Wheat.) 362, 366-67 (1824). The Constitution entrusts the power [to] the executive branch of the Government to preserve order and insure the public safety in times of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety. *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1946) (Stone, C.J., concurring). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat. See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) (If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority.); *Kahanamoku*, 327 U.S. at 336 (Stone, C.J., concurring) (Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity for emergency measures); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice) (regardless of statutory authorization, it is the duty . . . of the executive magistrate . . . to repel an invading foe); see also 3 Story, *Commentaries* § 1485 (the command and application of the public force . . . to maintain peace, and to resist foreign invasion are executive powers).

The Department believes that the President's constitutional responsibility to defend the Nation may justify reasonable, but warrantless, counter-intelligence searches. As the Commander-in-Chief, the President must be able to use whatever means necessary to prevent attacks upon the United States; this power, by implication, includes the authority to collect information necessary for its effective exercise.

(NO) This examination of the government's interest demonstrates that the current situation, in which Congress has recognized the President's authority to use force in response to a direct attack on the American homeland, has changed ~~strengthens~~ the calculus of a reasonable search government's interest. The government's interest has changed from merely conducting foreign intelligence surveillance to counter intelligence operations by other nations, to one of preventing terrorist attacks against American citizens and property within the continental United States itself. ~~The courts have observed that even the use of deadly force is reasonable under the Fourth Amendment if used in self defense or~~

to protect others. ~~See, e.g., Romero v. Board of County Commissioners, 60 F.3d 702 (10th Cir. 1995), cert. denied 516 U.S. 1073 (1996); O'Neal v. DeKalb County, 850 F.2d 653 (11th Cir. 1988).~~ Here, for Fourth Amendment purposes, the right to self defense is not that of an individual, but that of the nation and of its citizens. ~~Cf. In re Neagle, 135 U.S. 1 (1890); The Prize Cases, 67 U.S. (2 Black) 635 (1862).~~ If the government's heightened interest in self defense justifies the use of deadly force, then it certainly would also justify warrantless searches.

yes

III

It is against this background that the change to FISA should be understood. Both the executive branch and the courts have recognized that national security searches against foreign powers and their agents need not comport with the same Fourth Amendment requirements that apply to domestic criminal investigations. FISA embodies the idea that, in this context, the Fourth Amendment applies differently than in the criminal context. Nonetheless, FISA itself is not required by the Constitution, nor is it necessarily the case that its current standards match exactly to Fourth Amendment standards. Rather, like the warrant process in the normal criminal context, FISA represents a statutory procedure that, if used, will create a presumption that the surveillance is reasonable under the Fourth Amendment. Thus, it is wholly appropriate to amend FISA to bring its provisions into line with changes in the Fourth Amendment's reasonableness calculus. ~~As outlined above, that calculus has shifted in light of the September 11 attacks and the increased counter terrorism need.~~

~~This is not to say that FISA searches would be constitutional no matter how little~~

~~The national security and foreign intelligence purpose is present in the warrant application. We do not disagree with the analysis of the courts that it is the national security element ins of the search that justifies justify its exemption from the standard law enforcement warrant process. After the enactment of FISA, for example, courts have emphasized the distinction between searches done to collect foreign intelligence and those undertaken for pursuing criminal prosecutions. Although this may be due, in part, to a statutory construction of the FISA provisions, the courts' language may be seen as having broader application. As the Second Circuit has emphasized, although courts, even prior to the enactment of FISA, concluded that the collection of foreign intelligence information constituted an exception to the warrant requirement, the governmental interests presented in national security investigations differ substantially from those presented in traditional criminal~~

solely

prosecutions. ~~§~~ *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984). The *Duggan* Court held that FISA did not violate the Fourth Amendment because the requirements of FISA ~~§~~ provide an appropriate balance between the individual's interest in privacy and the government's need to obtain foreign intelligence information. ~~§~~ *Id.* at 74. However, ~~t~~The Court's holding was made in the context of acknowledging the reasonableness of ~~§~~ the adoption of prerequisites to surveillance that are less stringent than those precedent to the issuance of a warrant for a criminal investigation. ~~§~~ *Id.* at 73. ~~As such, the Court's finding that the purpose of the surveillance was to secure foreign intelligence information, and not directed towards criminal prosecution, may very well be of constitutional magnitude.~~ (yes)

Similarly, the Ninth Circuit found that the lowered probable cause showing required by FISA is reasonable because, although the application need not state that the surveillance is likely to uncover evidence of a crime, ~~§~~ the purpose of the surveillance is not to ferret out criminal activity but rather to gather intelligence, [and therefore] such a requirement would be illogical. ~~§~~ *United States v. Cavanagh*, 807 F.2d 787, 790-91 (9th Cir. 1987) (Kennedy, J.).⁴ And consistent with both the language of the Second and Ninth Circuits, the First Circuit, in upholding the constitutionality of FISA, explained that ~~§~~ [a]lthough evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance [and therefore] [t]he act is not to be used as an end-run around the Fourth Amendment's prohibition of warrantless searches. ~~§~~ *United States v. Johnson*, 952 F.2d 656, 572 (1st Cir. 1992) (citations omitted), cert. denied, 506 U.S. 816 (1992).

On the other hand, it is also clear that while FISA states that ~~§~~ the ~~§~~ purpose of a search is for foreign surveillance, that need not be the only purpose. Rather, law enforcement considerations can be taken into account, of a search so long as the surveillance also has a legitimate foreign intelligence purpose. FISA itself makes provision for the use in criminal trials of evidence obtained as a result of FISA searches, such as rules for the handling of evidence obtained through FISA searches, 50 U.S.C. § 1801(h) & 1806, and procedures for deciding (yes)

⁴The Ninth Circuit has reserved the question of whether the ~~§~~ primary purpose ~~§~~ test is too strict. *United States v. Sarkissian*, 841 F.2d 959, 964 (9th Cir. 1988).

suppression motions, *id.* § 1806(e). In approving FISA, the Senate Select Committee on Intelligence observed: ❖ U.S. persons may be authorized targets, and the surveillance is part of an investigative process often designed to protect against the commission of serious crimes such as espionage, sabotage, assassinations, kidnapping, and terrorist acts committed by or on behalf of foreign powers. Intelligence and criminal law enforcement tend to merge in this area.❖ S. Rep. No. 95-701, at 10-11 (1978). The Committee also recognized that ❖ foreign counterintelligence surveillance frequently seeks information needed to detect or anticipate the commission of crimes,❖ and that ❖ surveillance conducting under [FISA] need not stop once conclusive evidence of a crime is obtained, but instead may be extended longer where protective measures other than arrest and prosecution are more appropriate.❖ *Id.* at 11.

The All of this reflects the common sense point that hostile acts by those hostile to the United States may include, but not be limited to crimes. For that reason, courts agree that the gathering of counter intelligence need not be the only purpose of a constitutional FISA search. Aan ❖ otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used, as allowed by § 1806(b), as evidence in a criminal trial.❖

Duggan, 743 F.2d at 78. This is due to the recognition that ❖ in many cases the concerns of the government with respect to foreign intelligence will overlap those with respect to law enforcement.❖ *Id.* In order to police the line between legitimate foreign intelligence searches and law enforcement, most courts have adopted the test that the ❖ primary purpose❖ of a FISA search is to gather foreign intelligence. See *id.*; *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991); *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987), *cert. denied*, 486 U.S. 1010 (1988); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987), *cert. denied*, 485 U.S. 937 (1988). Not all courts, however, have felt compelled to adopt the primary purpose test. The Ninth Circuit has explicitly reserved the question whether the ❖ primary purpose❖ is too strict and the appropriate test is simply whether there was a legitimate foreign intelligence purpose. *United States v. Sarkissian*, 841 F.2d 959, 964 (9th Cir. 1988). No other Circuit has explicitly held that such a formulation would be unconstitutional.

In light of this case law and FISA's statutory structure, we

We do not believe that an amendment of FISA from ❖ the❖ purpose to ❖ a❖ purpose would be unconstitutional. To be sure, it is difficult to predict with exact certainty where the courts would draw the line in the context of balancing individual

privacy interests and government foreign policy concerns. So long, however, as the government has a legitimate objective in obtaining foreign intelligence information, it should not matter whether it also has a collateral interest or knowledge that the search may be useful in obtaining information for a criminal prosecution. As courts have observed, the criminal law interests of the government do not taint a FISA search when its foreign intelligence objective is primary. This implies that a FISA search should not be invalid when the interest in criminal prosecution is significant, but there is still a legitimate foreign intelligence purpose for the search. This concept flows in addition from the courts' recognition that the concerns of government with respect to foreign policy will often overlap with those of law enforcement.

Further, there are other reasons that justify the constitutionality of the proposed change to FISA. First, as an initial matter, the alteration in the statute could not be facially unconstitutional. As the Court has held, in order to succeed a facial challenge to a statute must show that the law is invalid ~~in every circumstance.~~ *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 699 (1995). As the Court made clear in *United States v. Salerno*, 481 U.S. 739 (1987), ~~[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.~~ *Id.* at 745. Such a challenge would fail here. ~~Even if FISA were amended to require that a purpose for the search be the collection of foreign intelligence, that class of searches would continue to include both searches in which foreign intelligence is the only purpose and searches in which it is the primary purpose — both permissible under current case law.~~ weak

Second, amending FISA would merely have the effect of changing the statute to track the Constitution. Courts have recognized that the executive branch has the authority to conduct warrantless searches for foreign intelligence purposes, so long as they are reasonable under the Fourth Amendment. Although the few courts that have addressed the issue have followed a primary purpose test, it is not clear that the Constitution, FISA, or Supreme Court case law requires that test. It may very well be the case that the primary purpose test is more demanding than that called for by the Fourth Amendment's reasonableness requirement. Adopting the proposed FISA amendment will continue to make clear that the government must have a legitimate foreign surveillance purpose in order to conduct a FISA search. It would also recognize that because the executive can more fully assess the requirements of national security than can the courts, and because the President has a constitutional duty to protect the national security, the courts should not deny him the authority → stated above

to conduct intelligence searches even when the national security purpose is secondary to criminal prosecution. At the same time, however, it still remains the province of the FISA court to determine whether such searches are constitutional by following a primary purpose test, or a less severe standard, such as requiring only a ~~significant~~ or ~~substantial~~ purpose. By altering the FISA standard to ~~a~~ purpose, Congress would allow the government to file applications that would be consistent with whatever Fourth Amendment standard the FISA court chooses.

For purposes of discussion, we could imagine a situation wherein the government might attempt to obtain a FISA warrant where ~~a~~ foreign intelligence purpose is present, but ~~the~~ primary purpose is to obtain evidence in furtherance of a criminal investigation. The fact that the search is aimed at furthering a criminal investigation, which only incidentally promotes the national security and our foreign affairs interests, probably would not exempt the search from the usual probable cause requirements of the Fourth Amendment. Once the objective in acquiring the information is aimed primarily at effecting a criminal prosecution, as opposed to gathering intelligence information for counterintelligence purposes, the case may be more like *Keith* than it is like *Truong Dinh Hung*. Rather than being a matter of judicial second guessing of the executive branch's determination that a foreign intelligence search is necessary, the objective would center instead on the desire to obtain information for a criminal prosecution.

In these circumstances, however, the FISA amendment would not permit unconstitutional searches. A court could still conclude that there is no real distinction between the law enforcement objective with incidental national security considerations, despite the fact that it arises in the foreign intelligence context, and the objective at issue in *Keith*. Once the primary purpose of the search is to further a criminal prosecution of one or more individuals, then absent exigent circumstances it would seem that the core principles of the Fourth Amendment are triggered, requiring the reasonableness determination of a neutral magistrate based on the full probable cause standard of the Fourth Amendment. No longer would it be a question of conducting the ~~delicate~~ and complex decisions that lie behind foreign intelligence surveillance, ~~Truong Dinh Hung~~, 629 F.2d at 913, nor would it primarily be a question of the ~~importance~~ of particular information to the security of the United States ~~or~~ ~~diplomacy~~ and military affairs, ~~id.~~ at 913-14. A court could decide that the warrant instead asked whether there are sufficient grounds to search premises or to conduct surveillance of private individuals for purposes of pursuing criminal prosecutions. In such a context, ~~individual~~

privacy interests come to the fore and government foreign policy concerns recede. ~~Id.~~ at 915.

A FISA court still remains an Article III court. As such, it still has an obligation to reject FISA applications that do not truly qualify for the relaxed constitutional standards applicable to national security searches. Rejecting an individual application, however, would not amount to a declaration that the ~~a purpose~~ standard was unconstitutional. Rather, the Court would only be interpreting the new standard so as not to violate the Constitution, in accordance with the canon of statutory construction that courts should read statutes to avoid constitutional difficulties. ~~See Public Citizen v. Department of Justice, 491 U.S. 440, 466 (1989); Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988).~~ Amending FISA to require only ~~a~~ purpose merely removes any difference between the statutory standard for reviewing FISA applications and the constitutional standard for national security searches.

Third, it is not unconstitutional to establish a standard for FISA applications that may be less demanding than the current standard, because it seems clear that the balance of Fourth Amendment considerations has shifted in the wake of the September 11 attacks. As discussed earlier in this memo, the reasonableness of a search under the Fourth Amendment depends on the balance between the government's interests and the privacy rights of the individuals involved. As a result of the direct terrorist attacks upon the continental United States, the government's interest has reached perhaps its most compelling level, that of defending the Nation from assault. This shift upward in governmental interest has the effect of expanding the class of reasonable searches under the Fourth Amendment. Thus, some surveillance that might not have satisfied the national security exception for warrantless searches before September 11, might today. Correspondingly, changing the FISA standard to ~~a~~ purpose will allow FISA warrants to issue in that class of searches. A lower standard also recognizes that, as national security concerns in the wake of the September 11 attacks have dramatically increased, the constitutional powers of the executive branch have expanded, while judicial competence has correspondingly receded. Amending FISA only recognizes that the Fourth Amendment standards will shift in reaction to our changed national security environment.

Fourth, amending FISA in this manner would be consistent with the Fourth Amendment because it only adapts the statutory structure to a new type of counter intelligence. FISA was enacted at a time when there was a clear distinction between foreign intelligence threats, which would be governed by more

NO

~~flexible standards, and domestic law enforcement, which was subject to the Fourth Amendment's requirement of probable cause. Even at the time of the act's passage in 1978, however, there was a growing realization that intelligence and criminal law enforcement tend to merge in [the] area of foreign counterintelligence and counterterrorism. S. Rep. No. 95 701, at 11. September 11's events demonstrate that the fine distinction between foreign intelligence gathering and domestic law enforcement has broken down. Terrorists, supported by foreign powers or interests, had lived in the United States for substantial periods of time, received training within the country, and killed thousands of civilians by hijacking civilian airliners. The attack, while supported from abroad, was carried out from within the United States itself and violated numerous domestic criminal laws. Thus, the nature of the national security threat, while still involving foreign control and requiring foreign counterintelligence, also has a significant domestic component, which may involve domestic law enforcement. Fourth Amendment doctrine, based as it is ultimately upon reasonableness, will have to take into account that national security threats in future cannot be so easily cordoned off from domestic criminal investigation. As a result, it is likely that courts will allow for more mixture between foreign intelligence gathering and domestic criminal investigation, at least in the counter terrorism context. Changing the FISA standard from the purpose to a purpose would be consistent with this likely development.~~

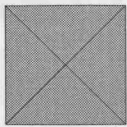
For the foregoing reasons, we believe that changing FISA's requirement that the purpose of a FISA search be to collect foreign intelligence to a purpose will not violate the Constitution. We hope that making the Committee aware of the Department's views is helpful to its deliberation. Please do not hesitate to contact my office if we may be of further assistance.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

AN IDENTICAL LETTER HAS BEEN SENT TO THE HONORABLE RICHARD SHELBY, VICE CHAIRMAN, SELECT COMMITTEE ON INTELLIGENCE; THE HONORABLE PATRICK J. LEAHY, CHAIRMAN, COMMITTEE ON THE JUDICIARY; AND THE HONORABLE ORRIN G. HATCH, RANKING MINORITY MEMBER, COMMITTEE ON THE JUDICIARY



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Bob Graham
Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Senator Graham:

I am writing to relay to you the views of the Department of Justice on the constitutionality of amending the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1800-1863 (~~FISA~~), so that a search may be approved when the collection of foreign intelligence is ~~a purpose~~ of the search. In its current form, FISA requires that ~~the purpose~~ of the search be for the collection of foreign intelligence. 50 U.S.C. § 1804(a)(7)(B) and 50 U.S.C. § 1823(a)(7)(B). We believe that this amendment would not violate the Fourth Amendment.

It should be made clear at the outset that the proposed FISA amendment cannot cause a facial violation of the Fourth Amendment. Because ~~a~~ purpose would include the current warrant applications in which foreign intelligence is ~~the~~ purpose of the search, a significant class of valid searches would continue to fall within the new statutory language. ~~It may be the case that some warrant applications — for example, those instances where criminal investigation constitutes an overwhelming purpose of the surveillance — will be rejected by the FISA court. In those situations, the FISA amendment would not be unconstitutional, so much as the Court would be construing the statute, according to the canon that statutes are to be read to avoid constitutional problems, so as not require the issuance of a warrant that would go beyond the Fourth Amendment. In other words, the proposed amendment cannot violate the Fourth Amendment because it would simply allow the Department to apply for FISA warrants up to the limit permitted by the Constitution, as determined by the FISA court. Amending FISA merely gives the Department the full flexibility to conduct foreign intelligence surveillance that is permitted by the Constitution itself. -- even if a court were to find the new standard problematic which we do not believe a court would or should.~~

The Fourth Amendment declares that, the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. U.S. Const. Amend. IV (emphasis added). The Amendment also declares that no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. Id.

Thus, the touchstone for review is whether a search is reasonable. See, e.g., *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) (the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a government search is 'reasonableness'). When law enforcement undertakes a search to discover evidence of criminal wrongdoing, the Supreme Court has said that reasonableness generally requires a judicial warrant. See *id.* at 653. But the Court has made clear that a warrant is not required for all government searches. A warrantless search can be constitutional when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. Id.

As a result, the Court properly has found a variety of warrantless government searches to be consistent with the Fourth Amendment. See, e.g., *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam) (certain automobile searches); *Acton, supra* (drug testing of high school athletes); *Michigan v. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (drunk driver checkpoints); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (drug testing of railroad personnel); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (random drug testing of federal customs officers); *United States v. Place*, 462 U.S. 696 (1983) (temporary seizure of baggage); *Michigan v. Summers*, 452 U.S. 692 (1981) (detention to prevent flight and to protect law enforcement officers); *Terry v. Ohio*, 392 U.S. 1 (1968) (temporary stop and limited search for weapons).

In these circumstances, the Court has examined several factors to determine whether a warrantless search is reasonable. As the Court stated just last Term: When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable. *Illinois v. McArthur*, 121 S. Ct. 946, 949 (2001). In creating these exceptions to its warrant requirement, the Court has found that, under the totality of the circumstances, the importance of the government's interests has outweighed the nature and the quality of the intrusion on the individual's Fourth Amendment interests. See *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

Of particular relevance here, the Court has found

warrantless searches reasonable when there are exigent circumstances, such as a potential threat to the safety of law enforcement officers or third parties. The Court has also recognized that a government official may not need to show the same kind of proof to a magistrate to obtain a warrant for a search unrelated to the investigation of a crime as one must who would search for the fruits or instrumentalities of crime. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 538 (1967). For example, where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. *Id.* See also *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (in context of seizure and exigent circumstances, Fourth Amendment would permit appropriately tailored roadblock to thwart an imminent terrorist attack or catch a dangerous criminal who is likely to flee).

II

This analysis of Fourth Amendment doctrine demonstrates that the government could conduct searches to obtain foreign intelligence without ~~satisfying all of the requirements applicable in the normal law enforcement context. It is important to understand the current shape of Fourth Amendment law, and how it would apply to the circumstances at hand, in order to evaluate the constitutionality of the proposed amendment to FISA~~ the need to show probable cause and obtain a search warrant. As we have noted earlier, the Fourth Amendment's reasonableness test for searches generally calls for a balancing of the government's interest against the individual's Fourth Amendment interests. Here, the nature of the government interest is great. In the counter-intelligence field, the government is engaging in electronic surveillance in order to prevent foreign powers or their agents from obtaining information or conducting operations that would directly harm the security of the United States.

To be sure, the Supreme Court has subjected counter-intelligence searches of purely domestic terrorist groups to a warrant requirement. When it first applied the Fourth Amendment to electronic surveillance, the Supreme Court specifically refused to extend its analysis to include domestic searches that were conducted for national security purposes. *Katz v. United States*, 389 U.S. 347, 358 n. 23 (1967); see also *Mitchell v. Forsyth*, 472 U.S. 511, 531 (1985). Later, however, in *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 299 (1972) (*Keith*), the Court held that the warrant requirement should apply to cases of terrorism by purely domestic groups. In doing so, the Justices framed the question by explaining that, ~~its~~ resolution is a matter of national concern, requiring sensitivity both to the

Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion.❖ *Id.* While acknowledging that ❖unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered,❖ *id.* at 312, the Court cautioned that ❖[t]he danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.❖ *Id.* at 314. As a result, the Court held that the absence of neutral and disinterested magistrates governing the reasonableness of the search impermissibly left ❖those charged with [the] investigation and prosecutorial duty [as] the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.❖ *Id.* at 317.

The Court explicitly noted, however, that it was not considering the scope of the President's surveillance power with respect to the activities of foreign powers within or without the country. *Id.* at 308. And after the *Keith* decision, lower courts have found that when the government conducts a search, for national security reasons, of a foreign power or its agents, it need not meet the same requirements that would normally apply in the context of a search of United States citizens who are not foreign agents or for criminal law enforcement purposes. In *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), for example, the Fourth Circuit observed that ❖the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, 'unduly frustrate,' the President in carrying out his foreign affairs responsibilities.❖ *Id.* at 913. The Court based this determination on a number of factors, including:

(1) ❖[a] warrant requirement would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations,❖ *id.*;

(2) ❖the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance Few, if any, district courts would be truly competent to judge the importance of particular information to the security of the United

States or the 'probable cause' to demonstrate that the government in fact needs to recover that information from one particular source, ❖ *id.* at 913-14; and

(3) the executive branch ❖ is also constitutionally designated as the pre-eminent authority in foreign affairs. ❖ *Id.* at 914.

The Court also recognized, however, that ❖ because individual privacy interests are severely compromised any time the government conducts surveillance without prior judicial approval, this foreign intelligence exception to the Fourth Amendment warrant requirement must be carefully limited to those situations in which the interests of the executive are paramount. ❖ *Id.* at 915. See also *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974); *United States v. Buck*, 548 F.2d 871 (9th Cir.), cert. denied, 434 U.S. 890 (1977); *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970), rev'd on other grounds, 403 U.S. 698 (1971).

Therefore, the Fourth Circuit held that the government was relieved of the warrant requirement when (1) the object of the search or surveillance is a foreign power, its agent or collaborators since such cases are ❖ most likely to call into play difficult and subtle judgments about foreign and military affairs, ❖ 629 F.2d at 915; and (2) ❖ when the surveillance is conducted 'primarily' for foreign intelligence reasons because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution. ❖ *Id.*

→ revealed
The factors favoring warrantless searches for national security reasons may be even more compelling under current circumstances than at the time of these lower court decisions. After the attacks on September 11, 2001, the government interest in conducting searches related to fighting terrorism is perhaps of the highest order -- the need to defend the nation from direct attack. As the Supreme Court has said, ❖ It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the nation. ❖ *Haig v. Agee*, 453 U.S. 280, 307 (1981). The compelling nature of the government's interest here may be understood in light of the Founders' express intention to create a federal government ❖ clothed with all the powers requisite to the complete execution of its trust. ❖ The *Federalist* No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961). Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution's adoption, because ❖

the circumstances which may affect the public safety are not reducible within certain determinate limits,

it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy.

Id. at 147-48.¹ Within the limits that the Constitution itself imposes, the scope and distribution of the powers to protect national security must be construed to authorize the most efficacious defense of the nation and its interests in accordance with the realistic purposes of the entire instrument. *Lichter v. United States*, 334 U.S. 742, 782 (1948). Nor is the authority to protect national security limited to that necessary to victories in the field. *Application of Yamashita*, 327 U.S. 1, 12 (1946). The authority over national security carries with it the inherent power to guard against the immediate renewal of the

¹See also *The Federalist* No. 34, at 211 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (Federal government is to possess an indefinite power of providing for emergencies as they might arise); *The Federalist* No. 41, at 269 (James Madison) ("Security against foreign danger is one of the primitive objects of civil society. . . . The powers requisite for attaining it, must be effectually confided to the federal councils.") Many Supreme Court opinions echo Hamilton's argument that the Constitution presupposes the indefinite and unpredictable nature of the circumstances which may affect the public safety, and that the federal government's powers are correspondingly broad. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981) (noting that the President exercises the executive authority in a world that presents each day some new challenge with which he must deal); *Hamilton v. Regents*, 293 U.S. 245, 264 (1934) (Federal government's war powers are well-nigh limitless in extent); *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506 (1870) (The measures to be taken in carrying on war . . . are not defined [in the Constitution]. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution.); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1870) (The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.).

conflict.❖ Id.

The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies. Intelligence gathering is a necessary function that enables the President to carry out that authority. The Constitution, for example, vests in the President the power to deploy military force in the defense of United States by the Vesting Clause, U.S. Const. Art. II, § 1, cl. 1, and by the Commander in Chief Clause, *id.*, § 2, cl. 1.² Intelligence operations, such as electronic surveillance, ~~very well may~~ be often are necessary and proper for the effective deployment and execution of military force against terrorists. Further, the Constitution makes explicit the President's obligation to safeguard the nation's security by whatever lawful means are available by imposing on him the duty to ❖take Care that the Laws be faithfully executed.❖ *Id.*, § 3. The implications of constitutional text and structure are confirmed by the practical consideration that national security decisions often require the unity in purpose and energy in action that characterize the

²See *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (President has authority to deploy United States armed forces ❖ abroad or to any particular region❖); *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (❖As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual❖); *Loving v. United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (The ❖inherent power❖ of the Commander in Chief ❖are clearly extensive.❖); *Maul v. United States*, 274 U.S. 501, 515-16 (1927) (Brandeis & Holmes, JJ., concurring) (President ❖may direct any revenue cutter to cruise in any waters in order to perform any duty of the service❖); *Commonwealth of Massachusetts v. Laird*, 451 F.2d 26, 32 (1st Cir. 1971) (the President has ❖power as Commander-in-Chief to station forces abroad❖); *Ex parte Vallandigham*, 28 F.Cas. 874, 922 (C.C.S.D. Ohio 1863) (No. 16,816) (in acting ❖under this power where there is no express legislative declaration, the president is guided solely by his own judgment and discretion❖); *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 6 (1992) (Barr, A.G.).

³As Alexander Hamilton explained in *The Federalist* No. 74, ❖ [o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the

Presidency rather than Congress.³

Judicial decisions since the beginning of the Republic confirm the President's constitutional power and duty to repel military action against the United States and to take measures to prevent the recurrence of an attack. As Justice Joseph Story said long ago, "[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are now found in the text of the laws." *The Apollon*, 22 U.S. (9 Wheat.) 362, 366-67 (1824). The Constitution entrusts the power [to] the executive branch of the Government to preserve order and insure the public safety in times of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety. *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1946) (Stone, C.J., concurring). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat. See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority."); *Kahanamoku*, 327 U.S. at 336 (Stone, C.J., concurring) ("Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity for emergency measures"); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice) (regardless of statutory authorization, it is the duty . . . of the executive magistrate

exercise of power by a single hand." *The Federalist* No. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). And James Iredell (later an Associate Justice of the Supreme Court) argued in the North Carolina Ratifying Convention that "[f]rom the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, despatch, and decision, which are necessary in military operations, can only be expected from one person." Debate in the North Carolina Ratifying Convention, in 4 Jonathan Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 107 (2d ed. Ayer Company, Publishers, Inc. 1987) (1888). See also 3 Joseph Story, *Commentaries on the Constitution* § 1485, at 341 (1833) (in military matters, "[u]nity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when single magistrate is entrusted exclusively with the power").

. . . to repel an invading foe~~❏~~; see also 3 Story, Commentaries § 1485 (~~❏~~[t]he command and application of the public force . . . to maintain peace, and to resist foreign invasion~~❏~~ are executive powers).

The Department believes that the President's constitutional responsibility to defend the Nation may justify reasonable, ~~but~~ warrantless, counter-intelligence searches. As the Commander-in-Chief, the President must be able to use whatever means necessary to prevent attacks upon the United States; this power, by implication, includes the authority to collect information necessary for its effective exercise.

existence of
This examination of the government's interest demonstrates that the current situation, in which Congress has recognized the President's authority to use force in response to a direct attack on the American homeland, ~~has changed~~ *has in effect already comp* strengthens the calculus of a ~~reasonable search~~ government's interest. The government's interest has changed from merely conducting foreign intelligence surveillance to counter intelligence operations by other nations, to one of preventing terrorist attacks against American citizens and property within the continental United States itself. ~~The courts have observed that even the use of deadly force is reasonable under the Fourth Amendment if used in self defense or to protect others. See, e.g., Romero v. Board of County Commissioners, 60 F.3d 702 (10th Cir. 1995), cert. denied 516 U.S. 1073 (1996); O'Neal v. DeKalb County, 850 F.2d 653 (11th Cir. 1988). Here, for Fourth Amendment purposes, the right to self defense is not that of an individual, but that of the nation and of its citizens. Cf. In re Neagle, 135 U.S. 1 (1890); The Prize Cases, 67 U.S. (2 Black) 635 (1862). If the government's heightened interest in self defense justifies the use of deadly force, then it certainly would also justify warrantless searches.~~ *(?)*

III

It is against this background that the change to FISA should be understood. Both the executive branch and the courts have recognized that national security searches against foreign powers and their agents need not comport with the same Fourth Amendment requirements that apply to domestic criminal investigations. FISA embodies the idea that, in this context, the Fourth Amendment applies differently than in the criminal context. Nonetheless, FISA itself is not required by the Constitution, nor is it necessarily the case that its current standards match exactly to Fourth Amendment standards. Rather, like the warrant process in the normal criminal context, FISA represents a statutory procedure that, if used, will create a presumption that the surveillance is reasonable under the Fourth Amendment. Thus, it is wholly appropriate to amend FISA to bring its provisions into line with changes in the Fourth Amendment's reasonableness calculus. *As outlined above, that calculus has shifted in light*

❏

~~of the September 11 attacks and the increased counter terrorism need.~~

~~This is not to say that FISA searches would be constitutional no matter how little~~

The national security and foreign intelligence purpose is present in the warrant application. We do not disagree with the analysis of the courts that it is the national security elements of the search that justifies justify its exemption from the standard law enforcement warrant process. After the enactment of FISA, for example, courts have emphasized the distinction between searches done to collect foreign intelligence and those undertaken for pursuing criminal prosecutions. Although this may be due, in part, to a statutory construction of the FISA provisions, the courts' language may be seen as having broader application. As the Second Circuit has emphasized, although courts, even prior to the enactment of FISA, concluded that the collection of foreign intelligence information constituted an exception to the warrant requirement, the governmental interests presented in national security investigations differ substantially from those presented in traditional criminal prosecutions. *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984). The *Duggan* Court held that FISA did not violate the Fourth Amendment because the requirements of FISA provide an appropriate balance between the individual's interest in privacy and the government's need to obtain foreign intelligence information. *Id.* at 74. However, the Court's holding was made in the context of acknowledging the reasonableness of the adoption of prerequisites to surveillance that are less stringent than those precedent to the issuance of a warrant for a criminal investigation. *Id.* at 73. ~~As such, the Court's finding that the purpose of the surveillance was to secure foreign intelligence information, and not directed towards criminal prosecution, may very well be of constitutional magnitude.~~

Similarly, the Ninth Circuit found that the lowered probable cause showing required by FISA is reasonable because, although the application need not state that the surveillance is likely to uncover evidence of a crime, the purpose of the surveillance is not to ferret out criminal activity but rather to gather intelligence, [and therefore] such a requirement would be illogical. *United States v. Cavanagh*, 807 F.2d 787, 790-91 (9th Cir. 1987) (Kennedy, J.).⁴ And consistent with both the language

⁴The Ninth Circuit has reserved the question of whether the primary purpose test is too strict. *United States v. Sarkissian*, 841 F.2d 959, 964 (9th Cir. 1988).

of the Second and Ninth Circuits, the First Circuit, in upholding the constitutionality of FISA, explained that ~~the~~ [a]lthough evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance [and therefore] [t]he act is not to be used as an end-run around the Fourth Amendment's prohibition of warrantless searches. ~~the~~ *United States v. Johnson*, 952 F.2d 656, 572 (1st Cir. 1992) (citations omitted), cert. denied, 506 U.S. 816 (1992).

On the other hand, it is also clear that ~~while FISA states that the purpose of a search is for foreign surveillance, that need not be the only purpose. Rather, law enforcement considerations can be taken into account, of a search so long as the surveillance also has a legitimate foreign intelligence purpose.~~ FISA itself makes provision for the use in criminal trials of evidence obtained as a result of FISA searches, such as rules for the handling of evidence obtained through FISA searches, 50 U.S.C. § 1801(h) & 1806, and procedures for deciding suppression motions, *id.* § 1806(e). In approving FISA, the Senate Select Committee on Intelligence observed: ~~U.S. persons may be authorized targets, and the surveillance is part of an investigative process often designed to protect against the commission of serious crimes such as espionage, sabotage, assassinations, kidnapping, and terrorist acts committed by or on behalf of foreign powers. Intelligence and criminal law enforcement tend to merge in this area.~~ S. Rep. No. 95-701, at 10-11 (1978). The Committee also recognized that ~~foreign counterintelligence surveillance frequently seeks information needed to detect or anticipate the commission of crimes, and that surveillance conducting under [FISA] need not stop once conclusive evidence of a crime is obtained, but instead may be extended longer where protective measures other than arrest and prosecution are more appropriate.~~ *Id.* at 11.

~~The~~ All of this reflects the common sense point that hostile acts by those hostile to the United States may include, but not be limited to crimes. For that reason, courts agree that ~~the gathering of counter intelligence need not be the only purpose of a constitutional FISA search. A~~ ~~an~~ otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used, as allowed by § 1806(b), as evidence in a criminal trial. ~~Duggan, 743 F.2d at 78. This is due to the recognition that in many cases the concerns of the government with respect to foreign intelligence will overlap those with respect to law enforcement.~~ *Id.* ~~In order to police the line between legitimate foreign intelligence searches and law enforcement, most courts have adopted the test that the primary purpose of a FISA search is to gather foreign intelligence. See id.; United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991); United States v. Delton, 835 F.2d 1067 (4th Cir. 1987), cert. denied, 486 U.S.~~

1010 (1988); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987), *cert. denied*, 485 U.S. 937 (1988). Not all courts, however, have felt compelled to adopt the primary purpose test. The Ninth Circuit has explicitly reserved the question whether the ~~the~~ primary purpose is too strict and the appropriate test is simply whether there was a legitimate foreign intelligence purpose. *United States v. Sarkissian*, 841 F.2d 959, 964 (9th Cir. 1988). No other Circuit has explicitly held that such a formulation would be unconstitutional.

~~In light of this case law and FISA's statutory structure, we~~

We do not believe that an amendment of FISA from ~~the~~ purpose to ~~a~~ purpose would be unconstitutional. ~~To be sure, it is difficult to predict with exact certainty where the courts would draw the line in the context of balancing individual privacy interests and government foreign policy concerns. So long, however, as the government has a legitimate objective in obtaining foreign intelligence information, it should not matter whether it also has a collateral interest or knowledge that the search may be useful in obtaining information for a criminal prosecution. As courts have observed, the criminal law interests of the government do not taint a FISA search when its foreign intelligence objective is primary. This implies that a FISA search should not be invalid when the interest in criminal prosecution is significant, but there is still a legitimate foreign intelligence purpose for the search. This concept flows in addition from the courts' recognition that the concerns of government with respect to foreign policy will often overlap with those of law enforcement.~~

~~Further, there are other reasons that justify the constitutionality of the proposed change to FISA. First, as an initial matter, the alteration in the statute could not be facially unconstitutional. As the Court has held, in order to succeed a facial challenge to a statute must show that the law is invalid in every circumstance. Babbitt v. Sweet Home Chapter, 515 U.S. 687, 699 (1995). As the Court made clear in United States v. Salerno, 481 U.S. 739 (1987), [a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. Id. at 745. Such a challenge would fail here. Even if FISA were amended to require that a purpose for the search be the collection of foreign intelligence, that class of searches would continue to include both searches in which foreign intelligence is the only purpose and searches in which it is the primary purpose — both permissible under current case law.~~

~~Second, amending FISA would merely have the effect of changing the statute to track the Constitution. Courts have recognized that the executive branch has the authority to conduct~~

warrantless searches for foreign intelligence purposes, so long as they are reasonable under the Fourth Amendment. Although the few courts that have addressed the issue have followed a primary purpose test, it is not clear that the Constitution, FISA, or Supreme Court case law requires that test. It may very well be the case that the primary purpose test is more demanding than that called for by the Fourth Amendment's reasonableness requirement. Adopting the proposed FISA amendment will continue to make clear that the government must have a legitimate foreign surveillance purpose in order to conduct a FISA search. It would also recognize that because the executive can more fully assess the requirements of national security than can the courts, and because the President has a constitutional duty to protect the national security, the courts should not deny him the authority to conduct intelligence searches even when the national security purpose is secondary to criminal prosecution. At the same time, however, it still remains the province of the FISA court to determine whether such searches are constitutional by following a primary purpose test, or a less severe standard, such as requiring only a ~~significant~~ or ~~substantial~~ purpose. By altering the FISA standard to ~~a~~ purpose, Congress would allow the government to file applications that would be consistent with whatever Fourth Amendment standard the FISA court chooses.

For purposes of discussion, we could imagine a situation wherein the government might attempt to obtain a FISA warrant where ~~a~~ foreign intelligence purpose is present, but ~~the~~ primary purpose is to obtain evidence in furtherance of a criminal investigation. The fact that the search is aimed at furthering a criminal investigation, which only incidentally promotes the national security and our foreign affairs interests, probably would not exempt the search from the usual probable cause requirements of the Fourth Amendment. Once the objective in acquiring the information is aimed primarily at effecting a criminal prosecution, as opposed to gathering intelligence information for counterintelligence purposes, the case may be more like *Keith* than it is like *Truong Dinh Hung*. Rather than being a matter of judicial second guessing of the executive branch's determination that a foreign intelligence search is necessary, the objective would center instead on the desire to obtain information for a criminal prosecution.

In these circumstances, however, the FISA amendment would not permit unconstitutional searches. A court could still conclude that there is no real distinction between the law enforcement objective with incidental national security considerations, despite the fact that it arises in the foreign intelligence context, and the objective at issue in *Keith*. Once the primary purpose of the search is to further a criminal prosecution of one or more individuals, then absent exigent circumstances it would seem that the core principles of the Fourth Amendment are triggered, requiring the reasonableness determination of a neutral magistrate based on the full probable

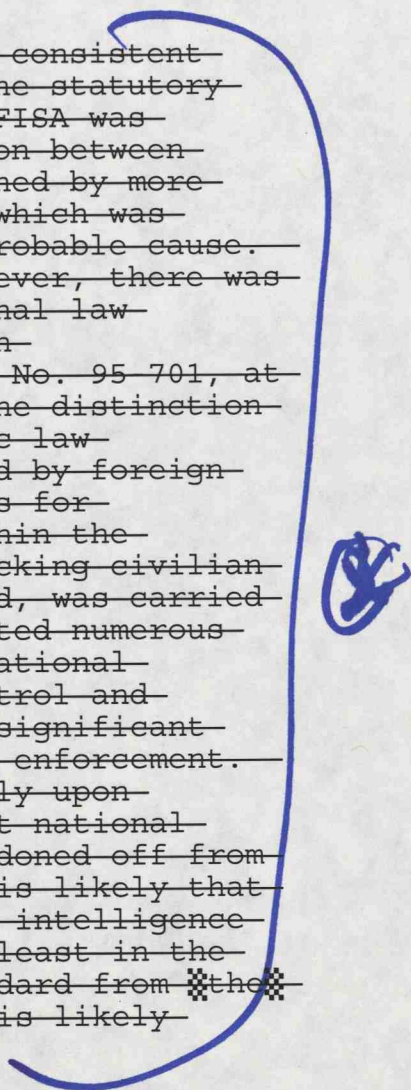
cause standard of the Fourth Amendment. No longer would it be a question of conducting the ~~the~~ delicate and complex decisions that lie behind foreign intelligence surveillance, ~~Truong Dinh Hung~~, 629 F.2d at 913, nor would it primarily be a question of the ~~the~~ importance of particular information to the security of the United States ~~or~~ ~~diplomacy~~ and military affairs, ~~id.~~ at 913-14. A court could decide that the warrant instead asked whether there are sufficient grounds to search premises or to conduct surveillance of private individuals for purposes of pursuing criminal prosecutions. In such a context, ~~individual~~ privacy interests come to the fore and government foreign policy concerns recede. ~~Id.~~ at 915.

A FISA court still remains an Article III court. As such, it still has an obligation to reject FISA applications that do not truly qualify for the relaxed constitutional standards applicable to national security searches. Rejecting an individual application, however, would not amount to a declaration that the ~~a purpose~~ standard was unconstitutional. Rather, the Court would only be interpreting the new standard so as not to violate the Constitution, in accordance with the canon of statutory construction that courts should read statutes to avoid constitutional difficulties. See *Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). Amending FISA to require only ~~a~~ purpose merely removes any difference between the statutory standard for reviewing FISA applications and the constitutional standard for national security searches.

Third, it is not unconstitutional to establish a standard for FISA applications that may be less demanding than the current standard, because it seems clear that the balance of Fourth Amendment considerations has shifted in the wake of the September 11 attacks. As discussed earlier in this memo, the reasonableness of a search under the Fourth Amendment depends on the balance between the government's interests and the privacy rights of the individuals involved. As a result of the direct terrorist attacks upon the continental United States, the government's interest has reached perhaps its most compelling level, that of defending the Nation from assault. This shift upward in governmental interest has the effect of expanding the class of reasonable searches under the Fourth Amendment. Thus, some surveillance that might not have satisfied the national security exception for warrantless searches before September 11, might today. Correspondingly, changing the FISA standard to ~~a~~ purpose will allow FISA warrants to issue in that class of searches. A lower standard also recognizes that, as national security concerns in the wake of the September 11 attacks have dramatically increased, the constitutional powers of the executive branch have expanded, while judicial competence has correspondingly receded. Amending FISA only recognizes that the

~~Fourth Amendment standards will shift in reaction to our changed national security environment.~~

~~Fourth, amending FISA in this manner would be consistent with the Fourth Amendment because it only adapts the statutory structure to a new type of counter intelligence. FISA was enacted at a time when there was a clear distinction between foreign intelligence threats, which would be governed by more flexible standards, and domestic law enforcement, which was subject to the Fourth Amendment's requirement of probable cause. Even at the time of the act's passage in 1978, however, there was a growing realization that intelligence and criminal law enforcement tend to merge in [the] area of foreign counterintelligence and counterterrorism. S. Rep. No. 95-701, at 11. September 11's events demonstrate that the fine distinction between foreign intelligence gathering and domestic law enforcement has broken down. Terrorists, supported by foreign powers or interests, had lived in the United States for substantial periods of time, received training within the country, and killed thousands of civilians by hijacking civilian airliners. The attack, while supported from abroad, was carried out from within the United States itself and violated numerous domestic criminal laws. Thus, the nature of the national security threat, while still involving foreign control and requiring foreign counterintelligence, also has a significant domestic component, which may involve domestic law enforcement. Fourth Amendment doctrine, based as it is ultimately upon reasonableness, will have to take into account that national security threats in future cannot be so easily cordoned off from domestic criminal investigation. As a result, it is likely that courts will allow for more mixture between foreign intelligence gathering and domestic criminal investigation, at least in the counter terrorism context. Changing the FISA standard from the purpose to a purpose would be consistent with this likely development.~~



For the foregoing reasons, we believe that changing FISA's requirement that the purpose of a FISA search be to collect foreign intelligence to a purpose will not violate the Constitution. We hope that making the Committee aware of the Department's views is helpful to its deliberation. Please do not hesitate to contact my office if we may be of further assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

AN IDENTICAL LETTER HAS BEEN SENT TO THE HONORABLE RICHARD

SHELBY, VICE CHAIRMAN, SELECT COMMITTEE ON INTELLIGENCE; THE
HONORABLE PATRICK J. LEAHY, CHAIRMAN, COMMITTEE ON THE JUDICIARY;
AND THE HONORABLE ORRIN G. HATCH, RANKING MINORITY MEMBER,
COMMITTEE ON THE JUDICIARY

Draft Testimony
Attorney General John Ashcroft
House Committee on the Judiciary
September 24, 2001

Gavora Draft with Israelite and Bryant Edits 9/23/01

Mr. Chairman, thank you for the opportunity to appear before this committee to discuss the nation's response to the act of war perpetrated on the United States of America on September 11.

Thank you Chairman Sensenbrenner and Ranking Member Conyers for your expeditious consideration of changes in the law to give law enforcement the tools we need to fight terrorism. I know that you and other members of the committee worked through the weekend to prepare for this hearing. For that, as well as the cooperation you've demonstrated throughout this time of national need, I am very grateful.

In his address to Congress and the nation last Thursday, President Bush declared war on terrorism and announced the United States will direct every resource at our command to victory in this war. As Attorney General, it is my duty to respond to this call to action by ensuring the capacity of United States law enforcement to perform two critical tasks: First, to bring terrorists to justice, and second, prevent more terrorism.

The Department of Justice and the FBI, in extraordinary cooperation and coordination with a number of other federal, state and local law enforcement agencies, have embarked on the largest, most comprehensive investigation in the history of this great nation. I would like to take this opportunity to briefly update the members of the committee on recent developments.

[INSERT UPDATE].

Watch list/pilots

Number of Bin Ladin associated groups operating in the U.S.

Identity theft by hijackers

Ease of gaining access into the U.S. using easily obtained visas from Belgium, etc.

Mr. Chairman and members of the committee, the American people do not have the luxury of unlimited time in erecting the necessary defenses to future terrorist acts. The danger that darkened the United States of America and the civilized world on September 11 did not pass with the atrocities committed that day. It requires that we provide law enforcement with the tools necessary to identify, dismantle and punish terrorist organizations before they strike again. Terrorism is a clear and present danger to Americans today.

[INSERT ANY ADDITIONAL NEWS ON NATURE OF THREAT].

The highly coordinated attacks of September 11 make it clear that terrorism is the activity of expertly organized, highly coordinated and well financed organizations and networks. These organizations operate across borders to advance their ideological agendas. They benefit from the shelter and the protection of like-minded regimes. They are undeterred by the threat of criminal sanctions. And they are willing to sacrifice the lives of their members in order to take the lives of their enemies.

This new terrorist threat to Americans on our soil is a turning point in America's history. It is a new challenge for law enforcement. Our fight against terrorism is not solely or primarily a criminal justice endeavor -- it is defense of our nation and its citizens. We cannot wait for terrorists to strike to begin investigations and make arrests. We must prevent first, prosecute second.

The fight against terrorism is now the highest priority of the Department of Justice. As we do in each and every law enforcement mission we undertake, we are conducting this effort with a total commitment to protect the rights and privacy of all Americans and the Constitutional protections we hold dear.

In the past, when American law enforcement confronted challenges to our safety and security from espionage, drug trafficking and organized crime, we met those challenges in ways that preserved our fundamental freedoms and civil liberties.

Today we seek to meet the challenge of terrorism within our borders and targeted at our friends and neighbors with the same careful regard for the Constitutional rights of Americans and respect for all human beings. Just as American rights and freedoms have been preserved throughout previous law enforcement campaigns, they must be preserved throughout this war on terrorism.

Americans were attacked September 11 by an enemy who does not seek territory, nor resources, nor material gain. Americans were attacked for our beliefs. Our beliefs in freedom, in equality before the law, and in the right of all men and all women to reach the maximum of the potential that God has placed within them. We were attacked because we have a deep abiding commitment to fairness, respect for privacy, and dedication to due process under the law. We were victimized for our nation's values. We will not now allow our values to become victims.

The United States Department of Justice must never waiver in its defense of the Constitution nor relent in its defense of civil rights. The American spirit which rose from the rubble in New York knows no prejudice and defies division by race, ethnicity or religion. The spirit which binds us and values which define us will light America's path from this darkness.

At the Department of Justice, we are charged with defending Americans' lives and liberties. We are asked to wage war against terrorism within our own borders. Today, we seek to enlist your assistance, for we seek new laws against America's enemies, foreign and domestic.

As the members of this Committee well understand, the deficiencies of our current laws on

terrorism reflect two facts: First, our laws fail to make defeating terrorism a national priority. Indeed, in a number of areas we have tougher laws against organized crime and drug trafficking than terrorism. Second, technology has dramatically outpaced our statutes. Law enforcement tools created decades ago were crafted for rotary telephones – not email, the Internet, mobile communications and voice mail.

Every day that passes with outdated statutes and the old rules of engagement is a day that terrorists have a competitive advantage. Until Congress makes these changes, we are fighting an uphill battle. Members of the Committee, I regret to inform you that today we are sending our troops into the modern field of battle with antique weapons. It is not a prescription for victory.

The anti-terrorism proposals that have been submitted by the Administration represent careful, balanced, and long overdue improvements to our capacity to combat terrorism. It is not a wish list: It is a modest set of essentials, focusing on five broad objectives, which I will briefly summarize.

First, law enforcement needs a strengthened and streamlined ability for our intelligence gathering agencies to gather the information necessary to disrupt, weaken and eliminate the infrastructure of terrorist organizations. Critically, we also need the authority for law enforcement to share vital information with our national security agencies in order to prevent future terrorist attacks.

Terrorist organizations have increasingly used technology to facilitate their criminal acts and hide their communications from law enforcement. Intelligence gathering laws that were written for the era of land-line telephone communications are ill-adapted for use in communications over multiple cell phones and computer networks -- communications that are also carried by multiple telecommunications providers located in different jurisdictions.

Terrorists like the September 11th hijackers are adept at frequently changing cell phones and routing email through different Internet computers in order to defeat surveillance. Our proposal creates a more efficient, technology-neutral standard for intelligence gathering, ensuring law enforcement's ability to trace the communications of terrorists over cell-phones, computer networks and any new technology that may be developed in the coming years.

These changes would streamline intelligence-gathering procedures only. We do not seek changes in the underlying protections in the law for the privacy of law-abiding citizens. The information captured by the proposed technology-neutral standard would be limited to the kind of information you might find in a phone bill, such as the phone numbers dialed by a particular telephone. The content of these communications would remain off-limits to monitoring by intelligence authorities, with the only exceptions being those under current law.

Our proposal would allow a federal court to issue a single order that would apply to all providers in a communications chain, including those outside the region where the court is located. We need speed in identifying and tracking down terrorists. Time is of the essence. The ability of law enforcement to trace a communication into a different jurisdiction without obtaining an

additional court order can be the difference between life and death for thousands of American citizens.

Second, we must make fighting terrorism a national priority in our criminal justice system. As the President recently stated, Osama bin Laden's terrorist group, Al Qaeda, is to terror what the mafia is to organized crime. However, our current laws make it easier to prosecute members of organized crime than to crack down on terrorists who can kill thousands of Americans in a single day. The same is true of drug traffickers and individuals involved in espionage – our laws treat these criminals and those who aid and abet them more severely than terrorists.

The statute of limitations on prosecuting the types of crimes that are likely to be committed by terrorists, for example, ranges from five to eight years. The crimes of murder and espionage, in contrast, have no statute of limitations. We would eliminate the statute of limitations on terrorist acts – and apply it retroactively to conspirators in the attacks of September 11.

We would make aiding and abetting a terrorist act a crime. Currently, for instance, harboring persons engaged in espionage is a criminal offense, but harboring terrorists is not. Given the wide terrorist networks suspected of participating in the September 11 attacks – both in the United States and in other countries – we must punish anyone who harbored a terrorist. Terrorists can run, but they should have no place to hide. Our proposal also increases the penalties for conspiracy to commit terrorist acts to a serious level as we have done for many drug crimes.

Third, we seek to enhance the authority of the Immigration and Naturalization Service to detain or remove suspected terrorists from within our borders.

The ability of terrorists to move freely across borders and operate within the United States is critical to their capacity to inflict damage on the citizens and facilities in the United States. Under current law, the existing grounds for removal of aliens for terrorism do not include certain activities that support terrorism, particularly the financing of terrorist organizations through contributions to front organizations. These front groups, often posing as humanitarian groups, are critical funding mechanisms for terrorists [VDD CONFIRMING].

We propose that aliens who provide material support to an organization that he or she knows or should know is a terrorist organization should be subject to removal from the United States.

Fourth, law enforcement must be able to "follow the money" in order to identify and neutralize terrorist networks. Sophisticated terrorist operations require substantial financial resources. *Just hours ago, President Bush signed a new Executive Order under the International Emergency Economic Powers Act (IEEPA) blocking the assets of, and transactions with, terrorist organizations and certain charitable, humanitarian, and business organizations that finance or support terrorism. At present, the President's powers in the event of armed hostilities or attacks upon the United States are limited to freezing assets and blocking transactions with*

such individuals and entities. Our proposal gives law enforcement the ability to seize their assets. In addition, criminal liability is imposed on those who knowingly engage in financial transactions – money laundering – involving the proceeds of terrorist acts.

Finally, we seek the ability for the President and the Department of Justice to provide swift emergency relief to the victims of terrorism and their families, particularly the heroic public safety officers, like those at the World Trade Center and the Pentagon, who rush into burning, collapsing building so that others can make it out to safety, including death and disability payments to public safety officers and their families. We also seek to marshal better the resources of government rapidly in the aftermath of an attack, including providing emergency response and victims relief funds to states. Additionally, we propose to lift the current cap on rewards for information and assistance in stopping terrorist organizations.

Members of the Committee, the attacks of September 11 drew a bright line of demarcation between that which is civil and that which is savage in the world, and our nation will never be the same. On one side of this line are freedom's enemies; murderers in the name of barbarous pieties. On the other side are friends of freedom; citizens of every race and ethnicity, bound together in quiet resolve to defend our way of life.

Among the high honors of my life has been the opportunity I have had over the past days and weeks to be in the company of these heroes, these friends of freedom; to meet with and work side-by-side with men and women who have exerted themselves beyond fatigue, who have set aside their own personal agendas and their personal safety to answer our nation's call. The nation has found new leaders – and new role models – in these brave Americans.

Now it falls to us, in the name of freedom and those who cherish it, to ensure our nation's capacity to defend ourselves from terrorists. Today I call upon Congress to act to strengthen our ability to fight this evil wherever it exists, and to ensure that the line between the civil and the savage, so brightly drawn on September 11, is never crossed again.

Thank you.

There are a number of provisions which we can agree to today:

109 Clarification of Scope

Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act ("Cable Act") to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and the laws that govern law enforcement's access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations.

110 Emergency Disclosure of Electronic Communications

Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. § 2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. § 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems.

151 Period of Orders of Electronic Surveillance

This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance or physical searches of U.S. citizens or permanent resident aliens.

206 Interagency Data Sharing

This amendment to the Immigration and Nationality Act (INA) would recognize that the interagency cooperation provided for in INA Section 105 now serves a broader border security function, and would enhance that function by improving consular officers' access to crime information. This is consistent with the fact that securing the borders of the U.S. against the entry of international terrorists, traffickers in narcotics, weapons or persons, international organized crime members, and illegal entrants is not the responsibility of any single federal agency. Consular officers abroad must facilitate legitimate travel while preventing the travel of individuals who present security or other threats to U.S. government interests. These officers need electronic access to information from border security and law enforcement agencies that will assist in identifying high-risk travelers, including information maintained by the FBI on aliens suspected of committing crimes in the U.S. (e.g., information contained in the NCIC-III and Wanted Persons File databases). Without this information, a consular officer could unknowingly grant a visa to a known or suspected criminal.

353 DNA Identification of Terrorists

The statutory provisions governing the collection of DNA samples from convicted federal offenders (42 U.S.C. § 14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. § 46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. § 844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. § 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes.

356 Definition Extending Maritime Jurisdiction

This amendment would explicitly extend the special and maritime criminal jurisdiction of the United States to U.S. diplomatic and consular premises and related private residences overseas, to the extent an offense is committed by or against a U.S. national. When offenses are committed by or against a U.S. national abroad on U.S. government property, the country in which the offense occurs may have little interest in prosecuting the case. Unless the United States is able to prosecute such offenders, these crimes may go unpunished. This section clarifies inconsistent caselaw to establish that the United States may prosecute offenses committed in its missions abroad, by or against its nationals.

401 Laundering the Proceeds of Terrorism

Money-laundering under 18 U.S.C. § 1956 involves conducting or attempting to conduct a financial transaction knowing that the property involved represents the proceeds of an unlawful activity specified in subsection (c)(7) of the statute. Violations of 18 U.S.C. § 2339A, which prohibits providing material support to terrorists within the United States, are already included as specified unlawful activities. This section provides more complete coverage of money-laundering related to terrorism by adding as a further predicate offense 18 U.S.C. § 2339B, which prohibits providing material support or resources to foreign terrorist organizations.

402 Material Support for Terrorism

18 U.S.C. § 2339A prohibits providing material support to terrorism. Under the statute's definitional subsection, the prohibited forms of support include (among many other things) "currency or other financial securities." This section adds an explicit reference to "monetary instruments" to the definition. The purpose of the amendment is to make it clear that the definition is to be taken expansively to encompass any and all forms of money, monetary instruments, or securities.

403 Assets of Terrorists Organizations

Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield "proceeds," and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug

forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001.

404 Technically Clarification Relating to Material Support

The Trade Sanctions Reform and Export Enhancement Act of 2000, Title IX of Public Law 106-387, creates exceptions in the nation's Trade Sanctions Programs for food and agricultural products. This section makes it clear that the Trade Sanctions Reform and Export Enhancement Act of 2000 does not limit 18 U.S.C. §§ 2339A or 2339B. In other words, the exceptions to trade sanctions for these items does not prevent criminal liability for the provision of these items to support terrorist activity or to foreign terrorist organizations as described in 2339A and 2339B. This is not a change from existing law, but rather serves to foreclose any possible misunderstanding or argument that the Act in some manner trumps or limits the prohibition on providing material support or resources to terrorism.

407 Trade Sanctions Reform Act Clarification

The Trade Sanctions Reform Act of 2000 requires the President to end unilateral agricultural and medical sanctions with respect to foreign entities and governments. This section would authorize Presidential control of agricultural and medical exports to all designated terrorists and narcotics entities wherever they are located. The section would authorize the President to retain sanctions with respect to exports of agricultural commodities, medicine and medical devices to designated terrorist entities.

408 Extraterritorial Jurisdiction Over Financial Crimes

Financial crimes admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States.

501 Office of Justice Programs Benefits to Disabled Peace Officers

This provision provides benefits to public safety officers disabled as a result of the September 11 attacks, as well as grants to the States for victim assistance. Consistent with 42 U.S.C. § 3796(b), the Department of Justice's FY2001 appropriations act places an aggregate cap of \$2.4 million on the benefits that may be paid to public safety officers who have become totally

disabled. A similar cap is found in both House and Senate FY2002 bills. Section 501 removes all caps with respect to officers who were totally disabled as a result of the September 11 attacks. This would authorize OJP annually to pay approximately \$120,000 to each totally-disabled officer for life or while he remains totally disabled. In the same way, the Department of Justice's existing grant programs to assist States in aiding crime victims provide mechanisms to respond to the attacks, 42 U.S.C. § 10603b, but the amounts available to meet the need are insufficient. Section 501 would authorize the spending of up to \$700 million from balances in the Crime Victims Fund (currently \$1.4 billion) to assist States in their victim-relief efforts. The \$700 million could be dispatched almost immediately to the States affected by the terrorist attacks, providing them with resources to supplement their own expenditures in aid of the victims.

Current law limits OJP's authority to work directly with service providers (as opposed to governments) under the circumstances created by the September 11 attacks, and to coordinate and manage emergency-response and other activities of its various components. 42 U.S.C. § 10603b(b). The law also is unclear as to proper execution of certain aspects of the Public Safety Officers Benefits program. Section 501 would amend OJP's authorities in these areas, specifically by authorizing OJP to work directly with service providers, in addition to governmental entities, to expedite terrorism victim relief efforts, by enhancing its authority to co-ordinate and manage emergency-response and other activities of its various components, and by clarifying provisions governing the provision of public safety officer benefits.

502 Attorney Generals Authority to Pay Rewards

Section 106 of the FY2001 DOJ appropriations act places a per-reward cap of \$2 million (and a \$10 million annual aggregate cap) on rewards that the Attorney General may offer. A similar cap is found in both House and Senate FY2002 bills. Given the increasing sophistication of terrorist acts, these limitations may hamper the Justice Department's ability to bring the guilty to justice. Section 502 therefore would remove these caps. It would authorize the Attorney General to offer or pay rewards of any amount he or the President determines to be necessary for information or assistance.

503 Limited Authority to Pay Overtime

For the past several years the Department of Justice Appropriations Acts have included provisions whereby Immigration and Naturalization Service funds could not be used to pay employees overtime pay in an amount in excess of \$30,000 during a calendar year. In light of recent national emergencies, this section will lift this cap in order to give the Attorney General flexibility in determining whether to authorize overtime if necessary. The Department anticipates that the Attorney General will issue Departmental guidance regarding when it is appropriate to authorize overtime pay in an amount that would exceed the limitations that have been lifted.

504 Secretary of State's Authority of Pay Rewards

This section amends section 36 of the State Department's Basic Authorities Act of 1956 to enhance the ability of the Department of State to pay rewards to assist in bringing terrorists to justice. The section would expand the bases for which the Department could authorize payment of terrorism rewards, eliminate the overall limitation on the amount of funds that can be appropriated to the Department to carry out the rewards program, and eliminate the requirement that the Department distribute funds equally for the purpose of preventing acts of international terrorism and narcotics trafficking. This section also raises the amount the Department could offer and pay under the program from \$5M to \$10M and allows the Secretary to authorize payment of an award larger than \$10M if the Secretary determines that doing so would be important to the national security interests of the United States.

505 Assistance to Countries Cooperating Against International Terrorism

Subsection (a) of this provision would give important new extraordinary authority for five years to the President to provide assistance or take other beneficial actions in favor of countries that support U.S. efforts to fight international terrorism. Subsection (b) would allow the President to provide anti-terrorism assistance to entities, as well as countries, without being subject to any restrictions. Subsection (c) allows the President to provide assistance for non-proliferation and export control activities without restrictions.

Other provisions, I believe require more study and cannot be considered hastily.

Current Law	Problems/Need	Administration Bill
<u>Sec. 101: Authorities relating to pen/trap orders</u> Title 18 U.S.C. 3121 <u>et. seq.</u> <u>Reason Pen/Trap Devices Used:</u> To capture non-content information, which is, for example, phone numbers and email addresses\ <u>Pen Registers indicate outgoing calls and Trap and Trace Numbers indicate incoming calls.</u> <u>Prohibition:</u> §3121(a) provides that no person shall use a pen register or trap and trace device without first obtaining a court order under §3123. <u>Limitation:</u> §3121(c) provides that a government agency authorized to use a pen register shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing and signaling information utilized in call processing. This limitation does not apply to trap and trace. <u>Penalty:</u> a person for knowingly violating subsection (a) shall be fined or imprisoned for not more than a year. <u>Standard to receive order:</u> the applicant certifies that the information likely to be obtained is "relevant to an ongoing criminal investigation."	<u>Problem:</u> Applying for an order in each jurisdiction causes serious delays. It is not clear whether current law law covers new technology used for communication. Law enforcement <u>does currently use trap and trace pen registers, but there are concerns that the law is not clear.</u>	The law still prohibits the use of pen registers or trap and trace devices by law enforcement without a court order. The bill would 1) give a court power to issue orders applicable to <u>all providers</u> in the chain of communication, including those providers in other districts. (Amendments to 3123(a) and 3127(2)) 2) updates language to cover new technologies by adding "routing and addressing information," in addition to the current dialing and signaling information, to the limitation provision under §3121(c) and the definitions of pen register and trap and trace under §3127(3) and (4). 3) adds trap and trace to the limitation provision under §3121(c). 4) DOES NOT CHANGE STANDARD TO RECEIVE ORDER.

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Current Law	Problems/Need	Administration Bill
<u>Sec. 102: Seizure of Voice Mail Messages Pursuant to Warrants</u> Title 18 U.S.C. §§2510 <u>et. seq.</u>, 2703 <u>et. seq.</u> Under §2703 <u>et. seq.</u>, law enforcement must obtain a search warrant (governed by Rule 41 of the Federal Rules of Criminal Procedure) to obtain stored wire and electronic communications. However, under §2510(1) a wiretap is required for electronic storage of wired communications or "voice mail." A search warrant may be issued if there is probable cause to believe that property searched or seized constitutes evidence of the crime, contraband, or was used or will be used in the crime. A wiretap order may be granted if there is probable cause: (1) that an individual is, has, or is about to commit, a particular offense listed in §2516; (2) that particular communications concerning that offense will be obtained; (3) that electronic communications to be intercepted are being used by such person and (4) normal investigative procedures have been tried and have failed.	<u>Problem:</u> Voice mail is a stored wire communication that should be covered under §2703. But instead is covered under §2510(1), that defines wired communications to include electronic storage of such communications. Voice mail is like a record and is not real time communications.	1) Section 102(1) amends 18 U.S.C. §2510(1) to exclude electronic records of prior communications as communications that require a wiretap order by striking "electronic storage of such communications." The bill also amends §2510(14) the definition of "electronic communications system" by adding "wire or" after "transmission." Thus the definition reads any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications. Section 102(2) amends 18 U.S.C. §2703 to allow the government to obtain a search warrant to access the voice mail messages being held by service providers for retrieval by a customer. Section 2703 provides the requirements for governmental access under Chapter 121.

Current Law	Problems/Need	Administration Bill
<u>Sec. 103: Authorized Disclosure</u> Title 18 U.S.C. §§2510(7) and 2517(1). Under current law, investigative or law enforcement officers who obtain information under the Wiretap Act may disclose the information to the extent that the information assists a criminal investigation of another investigative or law enforcement officer. The current law defines investigative and law enforcement officer. That definition does not include the intelligence community.	<u>Need:</u> Information sharing is very important in terrorist cases, where criminal activity may be related to terrorism activity. <u>Problem:</u> Law enforcement is not allowed to disclose Title III information to non-law enforcement officers even for such purposes as furthering an intelligence investigation.	Would amend current law to permit disclosure to the intelligence community, by amending the definition of law enforcement officer under §2510(7).
<u>Sec. 104 Savings Provisions</u> Under §2511(f) of current law, nothing contained in chapter 119 (relating to the interception of communications), chapter 121 (relating to stored communications), or Section 705 of the Communications Act are deemed to affect intelligence collection. The law is currently silent with regard to pen/trap orders.	<u>Problem:</u> The law is silent with regard to pen/trap orders and foreign intelligence. Law enforcement would like a clarification.	This section amends the current law to include the pen/trap chapter of the criminal code, which is chapter 206. This section also updates the language to cover new technologies, such as e-mail.
<u>Sec. 105 Use of Wiretap Information From Foreign Governments:</u> Currently, federal prosecutors use electronic surveillance conducted by foreign governments in criminal proceedings.	<u>Need:</u> This type of information is helpful terrorism investigations. The government would like to codify this practice.	This section would add a new section, §2514, to the Criminal Code. This section entitled <u>Use of Extraterritorial Interception of Foreign Governments</u>. The language would allow information that was collected by a foreign governments to be used in court, even if it would violate the fourth amendment, as long as it was lawfully obtained by the U.S. government.
<u>Sec. 106 Interception of Computer Trespasser Communications</u> Under current law, §2511(1) provides that, unless covered in a described exception, it is illegal to intercept and disclose wire, oral or electronic communications. Section 2511(2) provides the list of exceptions which includes providers of communications when they are protecting themselves from attack.	<u>Problem:</u> Currently, there is no explicit exception allowing law enforcement to assist victims of computer attacks upon the victims authorization. Instead law enforcement would have to seek a court order, even when the victim requested law enforcement assistance.	The bill adds §2511(2)(i) which would permit, under limited circumstances, victims of computer attacks to authorize law enforcement to monitor trespassers on their computer systems.

Current Law	Problems/Need	Administration Bill
<u>Sec. 107. Scope of Subpoenas for Records of Electronic Communications</u> Under current law, §2703(c) provides the requirements for a government subpoena for electronic communications or remote computing services. Current law, allows law enforcement to compel, through the use of a subpoena, a communications provider to disclose the name, address and length of service, of a subscriber.	<u>Need:</u> To identify a user's identity that may be involved in terrorism or some other criminal act. <u>Problem:</u> Currently, law enforcement cannot compel a communications provider, through the use of a subpoena, to disclose credit card numbers or other forms of payment to the provider by the suspect. While the provider can be compelled to provide name, address and length of service, this information does not help if the suspect uses a false name.	This section amends 2703(c) to require additional disclosure of information regarding the form of payment.
<u>Sec. 108 Nationwide Service of Search Warrants for Electronic Evidence.</u> Section 1803 U.S.C. §2703(a) requires a search warrant to compel service providers to disclose unopened e-mails.	<u>Problem:</u> The Administration is concerned that because Federal Rule of Criminal Procedure 41 requires that the "property" be obtained "within the district" of the issuing court, that an investigator located in Boston who is investigating a suspected terrorist in that city, might have to seek electronic e-mail in the Yahoo account of that suspect in California. The investigator would then need to coordinate with agents, prosecutors and judges in the Northern District of California where Yahoo is located.	Amends §2703 to strike the reference to the Federal Rules of Criminal Procedure to replace it with language that states "using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation" and would add the term a 'court of competent jurisdiction' to the definition section under §2711. That definition would use the court of competent jurisdiction definition under §3127 and add that the definition includes any federal court with that definition, without geographic limitation. This section does not affect the requirement for a search warrant, but rather attempts to address the investigative delays caused by the cross-jurisdictional nature of the Internet.
<u>Section 109 Clarification of Scope</u> Communications providers, including cable companies, that comply with court orders authorizing wiretapping and electronic surveillance cannot disclose that information to the suspect under surveillance. However, §631(c) of the Cable Communications Policy Act, title 47 U.S.C. §551, with certain exceptions, prohibits a cable operator from disclosing personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned. Even with a court order, the cable operator must notify the subscriber. This latter provision of the Cable Act conflicts with the Electronic Communications Privacy Act (ECPA).	<u>Problem:</u> The Cable Communications Policy Act did not take into account the changes in technology that have occurred over the last fifteen years, such as the fact that cable television companies now often provide Internet access and telephone service in addition to television programming.	This section amends §2511(2) of title 18 to remove this conflict. When cable companies offer services covered by the Electronic Communications Privacy Act (ECPA)(18 U.S.C. §2701 <u>et seq.</u>), the wiretap statute (18 U.S.C. §2510 <u>et seq.</u>), the stored communications statute (18 U.S.C. §2701 <u>et seq.</u>), and the trap and trace statute (18 U.S.C. §3121 <u>et seq.</u>) they are subject to those laws. The amendment does not affect the current prohibition on releasing records that reveal what a customer chooses to view. For example what particular premium channels or "pay per view" shows the customer selects.

Current Law	Problems/Need	Administration Bill
<u>Sec. 110 Emergency Disclosure of Electronic Communications.</u> Current law contains no provision allowing ISP providers to voluntarily disclose communications when necessary to protect life and limb. Additionally, while providers can disclose the content of communications to protect their rights and property, they may not disclose non-content records for the same reason.	Problem: There is no provision in current law that allows providers of electronic communications to disclose the communications of their customers or subscribers in emergencies that threaten death or serious bodily injury. Problem: Allowing providers to disclose content, but not non-content communications to protect their rights and property has, according to DOJ, substantially hindered providers ability to protect themselves from cyber-terrorists and criminals.	This section amends 18 U.S.C. §2702 to authorize electronic communications service providers to disclose the communications (or records relating to such communications) of their customers or subscribers if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay. This section would also amend the law to allow a communications provider to disclose non-content records (such as the subscriber's login records). Under current law, the communications provider is allowed to disclose content information but according to DOJ not expressly permitted to provide non-content records.

Current Law	Problems/Need	Administration Bill
<u>Sec. 151: Period of FISA Surveillance of Non-U.S. Persons</u> Section 105 of Foreign Intelligence Surveillance Act (FISA) (50 U.S.C. § 1805(e)(1) allows electronic surveillance of foreign governments for up to one year upon receiving the court authorization; and restricts electronic surveillance of foreign agent to no more than 90 days from receiving court authorization. Th government can go back to the FISA court after 90 days and get an extension on same basis as the original order application. Section 1824(d)(1) allows for a physical search of property of a foreign government for up to one year after receiving court authorization; and restricts a physical search of the property or person of a foreign agent for no more than 45 days after court authorization. FISA governs the use of electronic surveillance and physical searches of persons who engage in spying or acts against the U.S. including terrorism. Any electronic surveillance requires the Attorney General to submit an application to a FISA judge (appointed by the Chief Justice of the U.S. Supreme Court) that sets forth specific findings of why the order is needed, there is probable cause for it, and what steps will be taken to minimize procedures taken for the disclosure, retention or use of any information obtained. A person against whom surveillance is made may move to suppress the information in court.	Problem for physiscal search of foreign agents: Sometimes it takes more than 45 days to get on to the property. Problem for surveillance of foreign agent, is that it often takes longer to get the needed information than 90 days.	Section 1805 is amended to raise the 45 days limitation for physical searches to 90 days and 90-day period for electronic surveillance to one year of those acting as foreign agents.
<u>Section 152: Multi-Point Authority</u> Section 1805 (50 U.S.C. § 1805(c)(2)(B)) of FISA imposes obligations on third parties, like common carriers, custodians, landlords and others, to provide information to law enforcement authorities. These parties must be specified in any order sought from the FISA court.	The need to specifically name persons in the application is often thwarted by terrorists and foreign agents who are trained to avoid surveillance by using false names, changing cell phones, and changing Internet accounts prior to important meetings or communications.	Section 105(c)(2)(B) of FISA is amended by inserting language that permits the judge to direct the order to "other persons" if the court finds that "the actions of the target of the application may have the effect of thwarting the identification of a specified person."

Current Law	Problems/Need	Administration Bill
<u>Section 153: Foreign Intelligence Information:</u> Under 50 U.S.C. § 1804(a)(7) and 50 U.S.C. § 1823(a)(7)(B) a FISA application requires certification that “the purpose” is to obtain foreign intelligence information.	Current law requires that FISA be used only where foreign intelligence gathering is the “sole” or “primary” purpose of the investigation. This change is sought to eliminate the current need to continually evaluate the relative weight of criminal versus foreign intelligence investigation purposes.	50 U.S.C. § 1804(a)(7)(B) and U.S.C. § 1823(a)(7)(B) are amended to make an application for an order for surveillance require a showing that “a purpose” is to obtain foreign intelligence information.
<u>Section 154: Foreign Intelligence Information Sharing</u> Currently, title III (18 U.S.C. § 2510 <i>et. seq.</i>) and Rule 6(e) of the Federal Rules of Criminal Procedure limit disclosure and dissemination of information obtained for law enforcement purposes.	Currently, except in limited cases, it is impossible for criminal investigators to share information obtained through a grand jury or a title III intercept with the intelligence community or other federal law enforcement or senior executive branch officials. Thus, foreign intelligence investigators are often precluded from obtaining these materials when they are investigating transnational organized crime and terrorist groups.	Makes lawful the sharing of foreign intelligence information obtained in the course of a criminal investigation, (including information from a grand jury) with federal law enforcement, intelligence, protective, national security or immigration personnel or the President or Vice President of the United States.
<u>Section 155: Pen Register and Trap and Trace Authority:</u> 50 U.S.C. § 1842(c) is the pen register and trap and trace provision in the FISA that is modeled after similar provisions in title III (18 U.S.C. § 3121 <i>et. seq.</i>)	The pen register and trap and trace provisions in FISA have two requirements for approval of an order—that the information to be obtained is relevant and the device has been used to contact a foreign power. This last requirement is difficult to establish and therefore makes the process for obtaining a FISA pen/trap only slightly less burdensome than obtaining a full electronic surveillance.	The FISA provision authorizing pen registers and trace and traps on a communication device requires a showing that any information must be relevant but also that the device was use to contact“ an agent of a foreign power.” This latter requirement is dropped in the Administration draft bill.

Current Law	Problems/Need	Administration Bill
<u>Section 156: Business Records</u> Current law requires a court order in FISA (50 U.S.C. § 1862) for access to business records.	In many foreign intelligence investigations, the time and paperwork necessary to apply for and obtain a court order for access to business records can delay on ongoing investigation.	Section 156 creates a new section on administrative subpoenas for business records that may be issued by the Attorney General so long as they are relevant to the investigation.

Current Law	Problems/Need	Administration Bill
<u>Section 157: Miscellaneous National Security Authorities:</u> 18 U.S.C. § 2709(b) sets forth the limitations on the disclosure and use of information obtained from stored wire and electronic communications. The information can only be obtained by certain high level FBI officials through the use of National Security Letters that certify that the information being sought is relevant and the person being communicated with is an agent of a foreign power. National Security Letters are also used to obtain records and information under other statutes: the Electronic Communications Privacy Act (telephone and electronic communication records), the Financial Right to Privacy Act (financial records), and the Fair Credit Reporting Act (credit records).	Like the pen register and trap and trace provisions of FISA, this statute requires both a showing of relevance and that the communication facilities are being use to contact an agent of a foreign power or an individual engaged in international terrorism. By permitting more officials to be able to certify National Security Letters, ongoing investigations can continue without the delays often encountered under the current legal regime.	18 U.S.C. § 2709(b) sets forth the limitations on the disclosure and use of information obtained from stored wire and electronic communications

Current Law	Problems/Need	Administration Bill
<u>Section 158: Disclosure of Educational Records:</u> Section 408 of the National Education Statistics Act of 1994 (20 U.S.C. § 9007) prohibits the disclosure of student education records maintained by educational institutions and agencies. The disclosure of this information carries criminal penalties. Section 444 of the Protection of the Rights and Privacy of Students and Parents (FERPA) generally prohibits the release of student education records. Consent is required for release of this information.	Federal investigators believe that the records maintained by educational institutions may be helpful to their investigation of the recent terrorist bombings. Disclosure is barred by the statute and is a criminal offense to do so and in the other statute there are exceptions to disclosure, but it is unclear whether they apply to federal officials for the purpose of criminal investigations.	A new subsection is added to Section 408 of the National Education Statistics Act of 1994 (20 U.S.C. § 9007) that provides an exception to the release of records prohibition where such records contain information that could be important to the investigation of the September 11th bombing.

Current Law	Problems/Need	Administration Bill
<u>Section 159: Presidential Authorities:</u> The Trading With Enemy Act (50 App. U.S.C. § 5(b) gave the President authority to confiscate property during wartime or national emergency. In 1997, the International Economic Emergency Act (IEEPA) was passed which did not expressly give the President the authority to vest property in the United States and limited any application of the statute to only "during the time of war." (50 U.S.C. App. § 5(b).	The change made in the 1977 Act limited the President's clear legal authority to confiscate property during periods of hostilities when Congress has not formally declared war against a foreign nation. The other need for the amendment is to ensure that reviewing courts under IEEPA that base their rulings on an administrative record containing sensitive information not compromise national security while giving them all of the information they may need to determine whether a decision has not been arbitrary or capricious.	This section would amend 50 U.S.C. 1702 to restore the President's authority in limited circumstances involving armed hostilities or attacks against the United States to confiscate and vest in the United States property of the enemy. The second provision ensures that a reviewing court of an administrative record made under the International Economic Emergency Act may review sensitive national security information <i>in camera</i> and <i>ex parte</i> in the course of its judicial review without jeopardizing classified information that may be a part of the underlying record.

Current Law	Problems/Need	Administration Bill
<u>Section 301: No Statute of Limitations for Prosecuting Terrorism Offenses</u> Existing federal law (18 U.S.C. § 3282) bars prosecuting most offenses after five years. 18 U.S.C. § 3286 extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years.	The current law is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes. These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts than it does for the crimes characteristically committed by terrorists. In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissive than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally.	This section amends 18 U.S.C. § 3286 to provide that terrorism offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.
<u>Section 302: Alternative Maximum Penalties for Terrorism Crimes</u> Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them.	These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation.	This section adds a new subsection (e) to 18 U.S.C. § 3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes that are likely to be committed by terrorists.
<u>Section 303: Penalties for Terrorist Conspiracies</u> The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. § 371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty.	For some individual offenses and types of offenses, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see, e.g., 21 U.S.C. § 846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.	This section adds a new § 2332c to the terrorism chapter of the criminal code, which provides maximum penalties for attempts or conspiracies to commit terrorism crimes that are equal to the maximum penalties allowed if the crime were committed.
<u>Section 304: Terrorism Crimes as RICO Predicates</u> The list of predicate federal offenses for RICO, appearing in 18 U.S.C. § 1961(1), includes none of the offenses which are most likely to be committed by terrorists. RICO is currently used against any person who invests in or acquires and interest in, or conducts or participates in the affairs of an enterprise which engages in or whose activities affect interstate or foreign commerce through the collection of an unlawful debt or the patterned commission of various state and federal crimes.	The pattern of activity element of RICO requires the commission of two or more predicate offenses that are clearly related and suggest either a continuity of criminal activity or the threat of such continuity of criminal activity. Terrorists often engage in other criminal activities not defined as terrorism to promote, finance or achieve future crimes of terrorism.	This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations.

Current Law	Problems/Need	Administration Bill
<u>Section 305: Biological Weapons</u> Current law prohibits the possession, development, acquisition, etc., of biological agents or toxins “for use as a weapon.” 18 U.S.C. § 175.	This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins. It will also help the government control the number of persons who may have access to biological toxins or agents.	This section amends the definition of “for use as a weapon” to include all situations in which it can be proven that the defendant had no legitimate purpose for having such items. It also prohibits access to biological agents/toxins to certain categories of persons. Requires the Secretary of HHS to promulgate regulations regarding the handling of biological agents or toxins and providing for civil money penalties for failure to comply.
<u>Section 306: Support of Terrorism Through Expert Advice or Assistance</u> 18 U.S.C. § 2339A prohibits providing material support or resources to terrorists.	The existing definition of “material support or resources” is generally not broad enough to encompass expert services and assistance.	This section accordingly amends 18 U.S.C. § 2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes.
<u>Section 307: Prohibition Against Harboring Terrorists</u> 18 U.S.C. § 792 makes it a crime punishable by up to 10 years in prison to harbor or conceal an individual one knows or has reason to believe has committed or is about to commit a crime of espionage against the United States.	There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies.	This section accordingly amends 18 U.S.C. § 792 to make the same prohibition apply to harboring or concealing persons engaged in terrorism crimes (as specified in the 18 U.S.C. §25 list.

Current Law	Problems/Need	Administration Bill
<u>Section 308: Post Release Supervision of Terrorists</u> Existing federal law (18 U.S.C. § 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years.	There is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. § 841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.	This section accordingly adds a new subsection to 18 U.S.C. § 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics.
<u>Section 309: Definitions</u> Under current law, what constitutes a “Federal terrorism offense” is not defined in Title 18. A ‘federal crime of terrorism’ is defined in 18 U.S.C. 2332b(g)(5) for purposes of investigative authority.	This section adds several new provisions related to terrorist activities. It is important to clarify the circumstances and offenses that warrant the application of these new provisions.	This section adds a new section to define “federal terrorism offense”. It uses the current definition of a crime of terrorism under 18 U.S.C. 2332b(g)(5) to include the new section for possession of biological weapons (see above section 305); possession, production or transfer of chemical weapons; harboring terrorists; fraud, theft or extortion related to computers; disclosure of identities of covert agents; interference with a member of the flight crew; carrying a weapon or explosive on aircraft; or other criminal acts committed on an aircraft.

Current Law	Problems/Need	Administration Bill
<u>Section 351: Single-Jurisdiction Search Warrants for Terrorism:</u> Rule 41(a) of the Federal Rules of Criminal Procedure requires that a search warrant be obtained within the judicial district for searches within that district. The only exception is for cases where the property or person may leave the district.	The restriction of Rule 41 (a) causes unnecessary delays and burdens for the government in its investigation when it must obtain warrants in each district separately in the course of a single, ongoing investigation.	This section adds a new provision to Rule 41(a) of the Federal Rules of Criminal Procedure that permits search warrants to be obtained in any district in which activities related to terrorist acts may have occurred, regardless of where the warrants may be executed.

Current Law	Problems/Need	Administration Bill
<u>Section 352: Notice</u> 18 U.S.C. § 2705 sets forth the standards for the delay of notification after issuance of a court order where notice the object of the order or subpoena for stored wire or electronic communications may result in endangerment to an individual, flight from prosecution, destruction or tampering with evidence or intimidation of potential witnesses.	Law enforcement officials face a mix of inconsistent rules, practices and court decisions which vary widely from jurisdiction to jurisdiction across the country. This greatly hinders terrorism investigations and other cases.	This section uses the uniform standards and conditions in section 2705 to provide consistency throughout the country with regard to delay of notice to the object of the warrant if it would jeopardize the ongoing investigation. The standards in section 2705 are those applicable for stored communications.

Current Law	Problems/Need	Administration Bill
<u>Section 353: DNA Identification of Terrorists:</u> The DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135(d)(1)) governs the collection of DNA samples from convicted felons and includes a number of federal crimes for which the DNA samples are required to be collected from convicted federal offenders..	The DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135(d)(1)) governs the collection of DNA samples from convicted felons, but are restricted to a few crimes, and do not cover a number of crimes that may be committed by terrorists	The DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135(d)(1)) is amended to include Federal terrorism as an offense that would require the collection of DNA from convicted terrorists. The general Federal terrorism provision includes most of the crimes that are or would be committed by terrorists.

Current Law	Problems/Need	Administration Bill
<u>Section 354: Grand Jury Matters</u> Rule 6(e)(3)(A) of the Federal Rules of Criminal Procedure provides for an exception to the otherwise prohibited disclosure of matters occurring before the grand jury. Certain attorneys for the government in the performance of their duties are permitted access to grand jury information. The government attorney shall provide the court with a list of any non-lawyers who may have had access to such information.	The prohibition against disclosure of grand jury information impedes the sharing of information between federal law enforcement officials. Permitting sharing of certain grand jury information will assist in the investigation of terrorist crimes.	Rule 6(e)(3)(A) of the Federal Rules of Criminal Procedure is amended to include a new category of federal officials who may have access to information from a grand jury that relates to international or domestic terrorism.

Current Law	Problems/Need	Administration Bill
<u>Sec. 401: Laundering the Proceeds of Terrorism.</u> 18 U.S.C. 1956(c)(7)(D), prohibits conducting or attempting to conduct a financial transaction knowing that the property involved represents the proceeds of a specified unlawful activity	A more complete coverage of the crime of money-laundering related to terrorism is needed.	Adds a predicate offense, 18 U.S.C. 2339B, to the definition of "specified unlawful activities." 18 U.S.C. 2339B prohibits providing material support or resources to foreign terrorist organizations.
<u>Sec. 402: Material Support for Terrorism.</u> 18 U.S.C. 2339A and 2339B define the term "material support or resources" as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials."	A broader range of monetary instruments needs to be included within the scope of "material support or resources."	Amends 18 U.S.C. 2339A and 2339B to change the definition of the term "material support or resources." Replaces the term "other financial securities" with the phrase "monetary instruments or financial securities of any kind whatsoever."
<u>Sec. 403: Assets of Terrorist Organizations.</u> Current law does not contain any authority tailored specifically to the confiscation of terrorist assets, only proceeds	Most terrorism offenses do not yield "proceeds"	Amends 18 U.S.C. 981 to expressly provide that any property used to commit or facilitate the commission of, derived from, or otherwise involved in a Federal crime of terrorism is subject to civil and criminal forfeiture provisions.
<u>Sec. 404: Technical Clarification Relating to Provision of Material Support to Terrorism.</u> The Trade Sanctions Reform and Export Enhancement Act of 2000 creates exceptions to the nation's Trade Sanctions Programs for food and agricultural products	These exceptions could be used as a defense to a violation of 18 U.S.C. 2339A or 2339B which prohibit providing material support or resources to terrorists and terrorist organizations.	With this section, it is clear that anyone who provides food and agricultural products in support of terrorist activity will still be subject to criminal prosecution under sections 2339A and 2339B and will not be able to hide behind the exceptions to the Trade Sanctions Program.

Current Law	Problems/Need	Administration Bill
<u>Sec. 405: Disclosure of Tax Information in Terrorism and National-Security Investigations.</u> 26 U.S.C. 6103(i)(1) provides for the disclosure of returns and return information for use in criminal investigations. This section requires that an application be made to a Federal district court judge or magistrate for an order disclosing such returns.		This section amends 26 U.S.C. 6103(i)(3) to add a new paragraph entitled "response to terrorist incidents and threats" which would permit the disclosure of tax returns by the Internal Revenue Service to the extent necessary to assist officers or employees of any Federal, State or local law enforcement agency involved in the response to or the investigation of terrorist incidents, threats, or activities.
<u>Sec. 406: Restraint of Property Subject to Criminal Forfeiture.</u> 21 U.S.C. 853(e)(1) of the Controlled Substances Act provides that, upon application of the United States, a court may enter a restraining order or injunction to preserve the availability of property derived from or traceable to a criminal offense upon the filing of an indictment.	The fourth circuit already interprets the law to allow for the pre-trial restraint of non-traceable assets, however, the second circuit does not. This would resolve the conflict between the courts.	This section would expand the scope of the property that may be restrained by including property derived from the crime that cannot be located, has been transferred or sold, or has been placed beyond the jurisdiction of the court. Upon conviction the court shall order the forfeiture of any other property of the defendant up to the value of the property that was ordered restrained but cannot be recovered. The amendment is made to the Controlled Substances Act because the provisions governing criminal forfeitures in drug cases are incorporated, by statute (28 U.S.C. 2461(c)), into all other criminal forfeiture statutes.
<u>Sec. 407: Trade Sanctions Reform Act of 2000.</u> The Trade Sanctions Reform Act of 2000 required the President to end unilateral agricultural and medical sanctions with respect to foreign entities and governments.	An exception is needed for designated terrorist entities.	Allows the President to authorize, by executive order, unilateral sanctions against designated terrorist entities with respect to exports of agricultural commodities, medicine, and medical devices.

Current Law	Problems/Need	Administration Bill
<u>Sec. 408: Extraterritorial Jurisdiction.</u> 18 U.S.C. 1029 prohibits the production, use, or trafficking of counterfeit access devices. Access devices are any card, code, account number, pin number or other means of account access that can be used to obtain money, goods, services, or any other thing of value.	Long arm jurisdiction is needed.	This section would make any person outside the jurisdiction of the United States criminally liable for a violation of 18 U.S.C. 1029 if the offense involves an access device issued , owned, managed, or controlled by a financial institution within the jurisdiction of the United States <u>and</u> the person transports, delivers, conveys, or otherwise stores, or holds within the jurisdiction of the United States, the proceeds of such offense or property derived therefrom.

Current Law	Problems/Need	Administration Bill
<u>Section 501 Office of Justice Programs</u> Current law caps the Crime Victims Fund and funds for payments made to Public Safety Officers injured in the line of duty.	This provision specifically allows for additional funds allocated for responding to the needs of victims of terrorism and the brave public safety officers in relation to the September 11, 2001 attacks in recognition of the extraordinary circumstances of those attacks.	This section removes any caps or limitations available under the Victim's of Crime Fund to address the needs of the victims of the terrorists attacks of September 11, 2001. This section makes changes to the public safety officer benefits (PSOB) programs to provide for public safety officers disabled in the September 11, 2001, terrorist acts and the rescue efforts associated with those.
<u>Section 502 Attorney General's Authority to Pay Rewards</u> Current law limits the amount the Attorney General can pay for information in an investigation.	These provisions are necessary to assist the Department of Justice in the investigation and prosecution of those responsible for the attacks on September 11, 2001. This provision recognizes the importance of any information regarding the perpetrators.	This section specifies that any reward offered by the Attorney General in connection with hijackings or terrorist acts shall be subject to spending limitations or count toward any aggregate spending limitations.
<u>Section 503 Limited Authority to Pay Overtime</u> DOJ Approps Act for 2001 limited overtime pay to INS agents to \$30,000	INS agents have been working double duty to protect borders	This section removes the limitation on overtime pay for border agents

<u>Secretary of State's Authority to Pay Rewards</u> The Secretary of State operates a program to provide rewards for information that assists in the prevention of acts of terrorism, narcotics trafficking, and other criminal activities.	These provisions are necessary to assist in the investigation and prosecution of those responsible for the attacks on September 11, 2001. This provision recognizes the importance of any information regarding the perpetrators.	This section amends the Secretary of States rewards program to increase the maximum payment allowed to \$10 million or more if the Secretary personally determines that a offer or payment is essential to the national security interests of the United States. In addition to the information the Secretary of State is authorized to make rewards for, this section would authorize the Secretary to offer rewards for information that leads to "dismantling an organization" or information regarding the "identification or location of an individual holding a leadership position in a terrorist organization.
<u>Section 505: Assistance to Countries Co-Operating Against International Terrorism</u> No current provision.		This provision would give new authority for five years to the President to provide assistance to countries that support U.S. efforts in the fight against terrorism.



U.S. Department of Justice
Office of Legislative Affairs

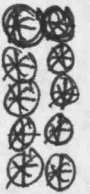
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Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Bob Graham
Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Pat A. Brien



Dear Senator Graham:

I am writing to relay to you the views of the Department of Justice on the constitutionality of amending the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1800-1863 ("FISA"), so that a search may be approved when the collection of foreign intelligence is "a purpose" of the search. In its current form, FISA requires that "the purpose" of the search be for the collection of foreign intelligence. 50 U.S.C. § 1804(a)(7)(B) and 50 U.S.C. § 1823(a)(7)(B). We believe that this amendment would not violate the Fourth Amendment.

It should be made clear at the outset that the proposed FISA amendment cannot cause a facial violation of the Fourth Amendment. Because "a" purpose would include the current warrant applications in which foreign intelligence is "the" purpose of the search, a significant class of valid searches would continue to fall within the new statutory language. ~~It may be the case that some warrant applications -- for example, those instances where criminal investigation constitutes an overwhelming purpose of the surveillance -- will be rejected by the FISA court.~~ In those situations, the FISA amendment would not be unconstitutional, so much as the Court would be construing the statute, according to the canon that statutes are to be read to avoid constitutional problems, so as not require the issuance of a warrant that would go beyond the Fourth Amendment. In other words, the proposed amendment cannot violate the Fourth Amendment because it would simply allow the Department to apply for FISA warrants up to the limit permitted by the Constitution, as determined by the FISA court. Amending FISA merely gives the Department the full flexibility to conduct foreign intelligence surveillance that is permitted by the Constitution itself.

even if a court were to find the new standard problematic, which we do not believe a court would or should.

I

The Fourth Amendment declares that, "the right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be

violated.” U.S. Const. Amend. IV (emphasis added). The Amendment also declares that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.” *Id.*

Thus, the touchstone for review is whether a search is “reasonable.” *See, e.g., Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) (“[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a government search is ‘reasonableness.’”). When law enforcement undertakes a search to discover evidence of criminal wrongdoing, the Supreme Court has said that reasonableness generally requires a judicial warrant. *See id.* at 653. But the Court has made clear that a warrant is not required for all government searches. A warrantless search can be constitutional “when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” *Id.*

As a result, the Court properly has found a variety of warrantless government searches to be consistent with the Fourth Amendment. *See, e.g., Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam) (certain automobile searches); *Acton, supra* (drug testing of high school athletes); *Michigan v. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (drunk driver checkpoints); *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602 (1989) (drug testing of railroad personnel); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (random drug testing of federal customs officers); *United States v. Place*, 462 U.S. 696 (1983) (temporary seizure of baggage); *Michigan v. Summers*, 452 U.S. 692 (1981) (detention to prevent flight and to protect law enforcement officers); *Terry v. Ohio*, 392 U.S. 1 (1968) (temporary stop and limited search for weapons).

In these circumstances, the Court has examined several factors to determine whether a warrantless search is reasonable. As the Court stated just last Term: “When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.” *Illinois v. McArthur*, 121 S. Ct. 946, 949 (2001). In creating these exceptions to its warrant requirement, the Court has found that, under the totality of the circumstances, the “importance of the government’s interests” has outweighed the “nature and the quality of the intrusion on the individual’s Fourth Amendment interests.” *See Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

Of particular relevance here, the Court has found warrantless searches reasonable when there are “exigent circumstances,” such as a potential threat to the safety of law enforcement officers or third parties. The Court has also recognized that a government official may not need to show the same kind of proof to a magistrate to obtain a warrant for a search unrelated to the investigation of a crime “as one must who would search for the fruits or instrumentalities of crime.” *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 538 (1967). For example, “[w]here considerations of health and safety are involved, the facts that would justify an inference of ‘probable cause’ to make an inspection are clearly different from those that would justify such

an inference where a criminal investigation has been undertaken." *Id.* See also *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (in context of seizure and exigent circumstances, Fourth Amendment would permit appropriately tailored roadblock to thwart an imminent terrorist attack or catch a dangerous criminal who is likely to flee).

II

This analysis of Fourth Amendment doctrine demonstrates that the government could conduct searches to obtain foreign intelligence without ~~satisfying all of the requirements applicable in the normal law enforcement context. It is important to understand the current shape of Fourth Amendment law, and how it would apply to the circumstances at hand, in order to evaluate the constitutionality of the proposed amendment to FISA.~~ As we have noted earlier, the Fourth Amendment's reasonableness test for searches generally calls for a balancing of the government's interest against the individual's Fourth Amendment interests. Here, the nature of the government interest is great. In the counter-intelligence field, the government is engaging in electronic surveillance in order to prevent foreign powers or their agents from obtaining information or conducting operations that would directly harm the security of the United States.

To be sure, the Supreme Court has subjected counter-intelligence searches of purely domestic terrorist groups to a warrant requirement. When it first applied the Fourth Amendment to electronic surveillance, the Supreme Court specifically refused to extend its analysis to include domestic searches that were conducted for national security purposes. *Katz v. United States*, 389 U.S. 347, 358 n. 23 (1967); see also *Mitchell v. Forsyth*, 472 U.S. 511, 531 (1985). Later, however, in *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 299 (1972) ("*Keith*"), the Court held that the warrant requirement should apply to cases of terrorism by purely domestic groups. In doing so, the Justices framed the question by explaining that, "[i]ts resolution is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion." *Id.* While acknowledging that "unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered," *id.* at 312, the Court cautioned that "[t]he danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." *Id.* at 314. As a result, the Court held that the absence of neutral and disinterested magistrates governing the reasonableness of the search impermissibly left "those charged with [the] investigation and prosecutorial duty [as] the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." *Id.* at 317.

The Court explicitly noted, however, that it was not considering the scope of the President's surveillance power with respect to the activities of foreign powers within or without the country. *Id.* at 308. And after the *Keith* decision, lower courts have found that when the government conducts a search, for national security reasons, of a foreign power or its agents, it need not meet the same requirements that would normally apply in the context of criminal law

a search of
United States citizens who
are not foreign agents or for

the need to obtain
show probable cause and
obtain a search warrant

enforcement. ^{purposes} In *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), for example, the Fourth Circuit observed that "the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, 'unduly frustrate,' the President in carrying out his foreign affairs responsibilities." *Id.* at 913. The Court based this determination on a number of factors, including:

- (1) "[a] warrant requirement would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations," *id.*;
- (2) "the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance Few, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States or the 'probable cause' to demonstrate that the government in fact needs to recover that information from one particular source," *id.* at 913-14; and
- (3) the executive branch "is also constitutionally designated as the pre-eminent authority in foreign affairs." *Id.* at 914.

The Court also recognized, however, that "because individual privacy interests are severely compromised any time the government conducts surveillance without prior judicial approval, this foreign intelligence exception to the Fourth Amendment warrant requirement must be carefully limited to those situations in which the interests of the executive are paramount." *Id.* at 915. See also *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); *United States v. Buck*, 548 F.2d 871 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977); *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971).

Therefore, the Fourth Circuit held that the government was relieved of the warrant requirement when (1) the object of the search or surveillance is a foreign power, its agent or collaborators since such cases are "most likely to call into play difficult and subtle judgments about foreign and military affairs," 629 F.2d at 915; and (2) "when the surveillance is conducted 'primarily' for foreign intelligence reasons because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution." *Id.*

The factors favoring warrantless searches for national security reasons may be even more compelling under current circumstances than at the time of these lower court decisions. After the attacks on September 11, 2001, the government interest in conducting searches related to fighting

terrorism is perhaps of the highest order -- the need to defend the nation from direct attack. As the Supreme Court has said, "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). The compelling nature of the government's interest here may be understood in light of the Founders' express intention to create a federal government "cloathed with all the powers requisite to the complete execution of its trust." *The Federalist* No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961). Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution's adoption, because "the circumstances which may affect the public safety" are not "reducible within certain determinate limits,"

it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy.

Id. at 147-48.¹ Within the limits that the Constitution itself imposes, the scope and distribution of the powers to protect national security must be construed to authorize the most efficacious defense of the nation and its interests in accordance "with the realistic purposes of the entire instrument." *Lichter v. United States*, 334 U.S. 742, 782 (1948). Nor is the authority to protect national security limited to that necessary "to victories in the field." *Application of Yamashita*,

¹ See also *The Federalist* No. 34, at 211 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (Federal government is to possess "an indefinite power of providing for emergencies as they might arise"); *The Federalist* No. 41, at 269 (James Madison) ("Security against foreign danger is one of the primitive objects of civil society. . . . The powers requisite for attaining it, must be effectually confided to the foederal councils.") Many Supreme Court opinions echo Hamilton's argument that the Constitution presupposes the indefinite and unpredictable nature of "the circumstances which may affect the public safety," and that the federal government's powers are correspondingly broad. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981) (noting that the President "exercis[es] the executive authority in a world that presents each day some new challenge with which he must deal"); *Hamilton v. Regents*, 293 U.S. 245, 264 (1934) (Federal government's war powers are "well-nigh limitless" in extent); *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506 (1870) ("The measures to be taken in carrying on war . . . are not defined [in the Constitution]. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1870) ("The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.").

327 U.S. 1, 12 (1946). The authority over national security "carries with it the inherent power to guard against the immediate renewal of the conflict." *Id.*

The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies. Intelligence gathering is a necessary function that enables the President to carry out that authority. The Constitution, for example, vests in the President the power to deploy military force in the defense of United States by the Vesting Clause, U.S. Const. Art. II, § 1, cl. 1, and by the Commander in Chief Clause, *id.*, § 2, cl. 1.² Intelligence operations, such as electronic surveillance, ~~very well may be~~ necessary and proper for the effective deployment and execution of military force against terrorists. Further, the Constitution makes explicit the President's *obligation* to safeguard the nation's security by whatever lawful means are available by imposing on him the duty to "take Care that the Laws be faithfully executed." *Id.*, § 3. The implications of constitutional text and structure

² See *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (President has authority to deploy United States armed forces "abroad or to any particular region"); *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual"); *Loving v. United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (The "inherent power" of the Commander in Chief "are clearly extensive."); *Maul v. United States*, 274 U.S. 501, 515-16 (1927) (Brandeis & Holmes, JJ., concurring) (President "may direct any revenue cutter to cruise in any waters in order to perform any duty of the service"); *Commonwealth of Massachusetts v. Laird*, 451 F.2d 26, 32 (1st Cir. 1971) (the President has "power as Commander-in-Chief to station forces abroad"); *Ex parte Vallandigham*, 28 F.Cas. 874, 922 (C.C.S.D. Ohio 1863) (No. 16,816) (in acting "under this power where there is no express legislative declaration, the president is guided solely by his own judgment and discretion"); *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 6 (1992) (Barr, A.G.).

³ As Alexander Hamilton explained in *The Federalist* No. 74, "[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." *The Federalist* No. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). And James Iredell (later an Associate Justice of the Supreme Court) argued in the North Carolina Ratifying Convention that "[f]rom the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, despatch, and decision, which are necessary in military operations, can only be expected from one person." Debate in the North Carolina Ratifying Convention, in 4 Jonathan Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 107 (2d ed. Ayer Company, Publishers, Inc. 1987) (1888). See also 3 Joseph Story, *Commentaries on the Constitution* § 1485, at 341 (1833) (in military matters, "[u]nity of plan, promptitude, activity,

are confirmed by the practical consideration that national security decisions often require the unity in purpose and energy in action that characterize the Presidency rather than Congress.³

Judicial decisions since the beginning of the Republic confirm the President's constitutional power and duty to repel military action against the United States and to take measures to prevent the recurrence of an attack. As Justice Joseph Story said long ago, "[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are now found in the text of the laws." *The Apollon*, 22 U.S. (9 Wheat.) 362, 366-67 (1824). The Constitution entrusts the "power [to] the executive branch of the Government to preserve order and insure the public safety in times of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety." *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1946) (Stone, C.J., concurring). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat. See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority."); *Kahanamoku*, 327 U.S. at 336 (Stone, C.J., concurring) ("Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity" for emergency measures); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice) (regardless of statutory authorization, it is "the duty . . . of the executive magistrate . . . to repel an invading foe"); see also 3 Story, *Commentaries* § 1485 ("[t]he command and application of the public force . . . to maintain peace, and to resist foreign invasion" are executive powers).

The Department believes that the President's constitutional responsibility to defend the Nation may justify reasonable, ~~but~~ warrantless counter-intelligence searches. As the Commander-in-Chief, the President must be able to use whatever means necessary to prevent attacks upon the United States; this power, by implication, includes the authority to collect information necessary for its effective exercise.

This examination of the government's interest demonstrates that the current situation, in which Congress has recognized the President's authority to use force in response to a direct attack on the American homeland, has changed the calculus of a reasonable search. The government's interest has changed from merely conducting foreign intelligence surveillance to counter intelligence operations by other nations, to one of preventing terrorist attacks against

and decision, are indispensable to success; and these can scarcely exist, except when single magistrate is entrusted exclusively with the power").

American citizens and property within the continental United States itself. The courts have observed that even the use of deadly force is reasonable under the Fourth Amendment if used in self-defense or to protect others. See, e.g., *Romero v. Board of County Commissioners*, 60 F.3d 702 (10th Cir. 1995), cert. denied 516 U.S. 1073 (1996); *O'Neal v. DeKalb County*, 850 F.2d 653 (11th Cir. 1988). Here, for Fourth Amendment purposes, the right to self-defense is not that of an individual, but that of the nation and of its citizens. Cf. *In re Neagle*, 135 U.S. 1 (1890); *The Prize Cases*, 67 U.S. (2 Black) 635 (1862). If the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches.

III

It is against this background that the change to FISA should be understood. Both the executive branch and the courts have recognized that national security searches against foreign powers and their agents need not comport with the same Fourth Amendment requirements that apply to domestic criminal investigations. FISA embodies the idea that, in this context, the Fourth Amendment applies differently than in the criminal context. Nonetheless, FISA itself is not required by the Constitution, nor is it necessarily the case that its current standards match exactly to Fourth Amendment standards. Rather, like the warrant process in the normal criminal context, FISA represents a statutory procedure that, if used, will create a presumption that the surveillance is reasonable under the Fourth Amendment. Thus, it is wholly appropriate to amend FISA to bring its provisions into line with changes in the Fourth Amendment's reasonableness calculus. ~~As outlined above, that calculus has shifted in light of the September 11 attacks and the increased counter-terrorism need.~~

~~This is not to say that FISA searches would be constitutional no matter how little foreign intelligence purpose is present in the warrant application. We do not disagree with the analysis of the courts that it is the national security element in the search that justifies its exemption from the standard law enforcement warrant process. After the enactment of FISA, for example, courts have emphasized the distinction between searches done to collect foreign intelligence and those undertaken for pursuing criminal prosecutions. Although this may be due, in part, to a statutory construction of the FISA provisions, the courts' language may be seen as having broader application. As the Second Circuit has emphasized, although courts, even prior to the enactment of FISA, concluded that the collection of foreign intelligence information constituted an exception to the warrant requirement, "the governmental interests presented in national security investigations differ substantially from those presented in traditional criminal prosecutions." *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984). The *Duggan* Court held that FISA did not violate the Fourth Amendment because the requirements of FISA "provide an appropriate balance between the individual's interest in privacy and the government's need to obtain foreign intelligence information." *Id.* at 74. However, the Court's holding was made in the context of acknowledging the reasonableness of "the adoption of prerequisites to surveillance that are less stringent than those precedent to the issuance of a warrant for a criminal investigation." *Id.* at 73. As such, the Court's finding that the purpose of the surveillance was to secure foreign intelligence information, and not directed towards criminal prosecution, may very well be of~~

constitutional magnitude.

Similarly, the Ninth Circuit found that the lowered probable cause showing required by FISA is reasonable because, although the application need not state that the surveillance is likely to uncover evidence of a crime, "the purpose of the surveillance is not to ferret out criminal activity but rather to gather intelligence, [and therefore] such a requirement would be illogical." *United States v. Cavanagh*, 807 F.2d 787, 790-91 (9th Cir. 1987) (Kennedy, J.).⁴ And consistent with both the language of the Second and Ninth Circuits, the First Circuit, in upholding the constitutionality of FISA, explained that "[a]lthough evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance [and therefore] [t]he act is not to be used as an end-run around the Fourth Amendment's prohibition of warrantless searches." *United States v. Johnson*, 952 F.2d 656, 572 (1st Cir. 1992) (citations omitted), *cert. denied*, 506 U.S. 816 (1992).

On the other hand, it is also clear that while FISA states that "the" purpose of a search is for foreign surveillance, that need not be the only purpose. Rather, law enforcement considerations can be taken into account, so long as the surveillance also has a legitimate foreign intelligence purpose. FISA itself makes provision for the use in criminal trials of evidence obtained as a result of FISA searches, such as rules for the handling of evidence obtained through FISA searches, 50 U.S.C. § 1801(h) & 1806, and procedures for deciding suppression motions, *id.* § 1806(e). In approving FISA, the Senate Select Committee on Intelligence observed: "U.S. persons may be authorized targets, and the surveillance is part of an investigative process often designed to protect against the commission of serious crimes such as espionage, sabotage, assassinations, kidnapping, and terrorist acts committed by or on behalf of foreign powers. Intelligence and criminal law enforcement tend to merge in this area." S. Rep. No. 95-701, at 10-11 (1978). The Committee also recognized that "foreign counterintelligence surveillance frequently seeks information needed to detect or anticipate the commission of crimes," and that "surveillance conducting under [FISA] need not stop once conclusive evidence of a crime is obtained, but instead may be extended longer where protective measures other than arrest and prosecution are more appropriate." *Id.* at 11.

The courts agree that the gathering of counter-intelligence need not be the only purpose of a constitutional FISA search. An "otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used, as allowed by § 1806(b), as evidence in a criminal trial." *Duggan*, 743 F.2d at 78. This is due to the recognition that "in many cases the concerns of the government with respect to foreign intelligence will overlap those with respect to law enforcement." *Id.* In order to police the line

⁴ The Ninth Circuit has reserved the question of whether the "primary purpose" test is too strict. *United States v. Sarkissian*, 841 F.2d 959, 964 (9th Cir. 1988).

All of this reflects the common sense point that hostile acts by those hostile to the United States may include, but not be limited, to crimes.

~~has been interpretation of statute~~
between legitimate foreign intelligence searches and law enforcement, most courts have adopted the test that the "primary purpose" of a FISA search is to gather foreign intelligence. See *id.*; *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991); *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987), *cert. denied*, 486 U.S. 1010 (1988); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987), *cert. denied*, 485 U.S. 937 (1988). Not all courts, however, have felt compelled to adopt the primary purpose test. The Ninth Circuit has explicitly reserved the question whether the "primary purpose" is too strict and the appropriate test is simply whether there was a legitimate foreign intelligence purpose. *United States v. Sarkissian*, 841 F.2d 959, 964 (9th Cir. 1988). No other Circuit has explicitly held that such a formulation would be unconstitutional.

~~In light of this case law and FISA's statutory structure,~~ We do not believe that an amendment of FISA from "the" purpose to "a" purpose would be unconstitutional. ~~To be sure, it is difficult to predict with exact certainty where the courts would draw the line in the context of balancing individual privacy interests and government foreign policy concerns.~~ So long, ~~however,~~ as the government has a legitimate objective in obtaining foreign intelligence information, it should not matter whether it also has a collateral interest in obtaining information for a criminal prosecution. ~~As courts have observed, the criminal law interests of the government do not taint a FISA search when its foreign intelligence objective is primary. This implies that a FISA search should not be invalid when the interest in criminal prosecution is significant, but there is still a legitimate foreign intelligence purpose for the search.~~ This concept flows from the courts' recognition that the concerns of government with respect to foreign policy will often overlap with those of law enforcement.

~~in addition~~
Further, there are other reasons that justify the constitutionality of the proposed change to FISA. First, as an initial matter, the alteration in the statute could not be facially unconstitutional. As the Court has held, in order to succeed a facial challenge to a statute must show that the law is invalid "in every circumstance." *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 699 (1995). As the Court made clear in *United States v. Salerno*, 481 U.S. 739 (1987), "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* at 745. Such a challenge would fail here. Even if FISA were amended to require that "a" purpose for the search be the collection of foreign intelligence, that class of searches would continue to include both searches in which foreign intelligence is the only purpose and searches in which it is the primary purpose -- both permissible under current case law.

Second, amending FISA would merely have the effect of changing the statute to track the Constitution. Courts have recognized that the executive branch has the authority to conduct warrantless searches for foreign intelligence purposes, so long as they are reasonable under the Fourth Amendment. Although the few courts that have addressed the issue have followed a primary purpose test, it is not clear that the Constitution, FISA, or Supreme Court case law requires that test. It may very well be the case that the primary purpose test is more demanding than that called for by the Fourth Amendment's reasonableness requirement. Adopting the proposed FISA amendment will continue to make clear that the government must have a

legitimate foreign surveillance purpose in order to conduct a FISA search. It would also recognize that because the executive can more fully assess the requirements of national security than can the courts, and because the President has a constitutional duty to protect the national security, the courts should not deny him the authority to conduct intelligence searches even when the national security purpose is secondary to criminal prosecution. At the same time, however, it still remains the province of the FISA court to determine whether such searches are constitutional by following a primary purpose test, or a less severe standard, such as requiring only a "significant" or "substantial" purpose. By altering the FISA standard to "a" purpose, Congress would allow the government to file applications that would be consistent with whatever Fourth Amendment standard the FISA court chooses.

For purposes of discussion, we could imagine a situation wherein the government might attempt to obtain a FISA warrant where "a" foreign intelligence purpose is present, but "the primary" purpose is to obtain evidence in furtherance of a criminal investigation. The fact that the search is aimed at furthering a criminal investigation, which only incidentally promotes the national security and our foreign affairs interests, probably would not exempt the search from the usual probable cause requirements of the Fourth Amendment. Once the objective in acquiring the information is aimed primarily at effecting a criminal prosecution, as opposed to gathering intelligence information for counterintelligence purposes, the case may be more like *Keith* than it is like *Truong Dinh Hung*. Rather than being a matter of judicial second-guessing of the executive branch's determination that a foreign intelligence search is necessary, the objective would center instead on the desire to obtain information for a criminal prosecution.

In these circumstances, however, the FISA amendment would not permit unconstitutional searches. A court could still conclude that there is no real distinction between the law enforcement objective with incidental national security considerations, despite the fact that it arises in the foreign intelligence context, and the objective at issue in *Keith*. Once the primary purpose of the search is to further a criminal prosecution of one or more individuals, then absent exigent circumstances it would seem that the core principles of the Fourth Amendment are triggered, requiring the reasonableness determination of a neutral magistrate based on the full probable cause standard of the Fourth Amendment. No longer would it be a question of conducting the "delicate and complex decisions that lie behind foreign intelligence surveillance," *Truong Dinh Hung*, 629 F.2d at 913, nor would it primarily be a question of the "importance of particular information to the security of the United States" or "diplomacy and military affairs," *id.* at 913-14. A court could decide that the warrant instead asked whether there are sufficient grounds to search premises or to conduct surveillance of private individuals for purposes of pursuing criminal prosecutions. In such a context, "individual privacy interests come to the fore and government foreign policy concerns recede." *Id.* at 915.

A FISA court still remains an Article III court. As such, it still has an obligation to reject FISA applications that do not truly qualify for the relaxed constitutional standards applicable to national security searches. Rejecting an individual application, however, would not amount to a declaration that the "a purpose" standard was unconstitutional. Rather, the Court would only be interpreting the new standard so as not to violate the Constitution, in accordance with the canon

of statutory construction that courts should read statutes to avoid constitutional difficulties. See *Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). Amending FISA to require only "a" purpose merely removes any difference between the statutory standard for reviewing FISA applications and the constitutional standard for national security searches.

Third, it is not unconstitutional to establish a standard for FISA applications that may be less demanding than the current standard, because it seems clear that the balance of Fourth Amendment considerations has shifted in the wake of the September 11 attacks. As discussed earlier in this memo, the reasonableness of a search under the Fourth Amendment depends on the balance between the government's interests and the privacy rights of the individuals involved. As a result of the direct terrorist attacks upon the continental United States, the government's interest has reached perhaps its most compelling level, that of defending the Nation from assault. This shift upward in governmental interest has the effect of expanding the class of reasonable searches under the Fourth Amendment. Thus, some surveillance that might not have satisfied the national security exception for warrantless searches before September 11, might today. Correspondingly, changing the FISA standard to "a" purpose will allow FISA warrants to issue in that class of searches. A lower standard also recognizes that, as national security concerns in the wake of the September 11 attacks have dramatically increased, the constitutional powers of the executive branch have expanded, while judicial competence has correspondingly receded. Amending FISA only recognizes that the Fourth Amendment standards will shift in reaction to our changed national security environment.

Fourth, amending FISA in this manner would be consistent with the Fourth Amendment because it only adapts the statutory structure to a new type of counter-intelligence. FISA was enacted at a time when there was a clear distinction between foreign intelligence threats, which would be governed by more flexible standards, and domestic law enforcement, which was subject to the Fourth Amendment's requirement of probable cause. Even at the time of the act's passage in 1978, however, there was a growing realization that "intelligence and criminal law enforcement tend to merge in [the] area" of foreign counterintelligence and counterterrorism. S. Rep. No. 95-701, at 11. September 11's events demonstrate that the fine distinction between foreign intelligence gathering and domestic law enforcement has broken down. Terrorists, supported by foreign powers or interests, had lived in the United States for substantial periods of time, received training within the country, and killed thousands of civilians by hijacking civilian airliners. The attack, while supported from abroad, was carried out from within the United States itself and violated numerous domestic criminal laws. Thus, the nature of the national security threat, while still involving foreign control and requiring foreign counterintelligence, also has a significant domestic component, which may involve domestic law enforcement. Fourth Amendment doctrine, based as it is ultimately upon reasonableness, will have to take into account that national security threats in future cannot be so easily cordoned off from domestic criminal investigation. As a result, it is likely that courts will allow for more mixture between foreign intelligence gathering and domestic criminal investigation, at least in the counter-terrorism context. Changing the FISA standard from "the" purpose to "a" purpose

would be consistent with this likely development.

For the foregoing reasons, we believe that changing FISA's requirement that "the" purpose of a FISA search be to collect foreign intelligence to "a" purpose will not violate the Constitution. We hope that making the Committee aware of the Department's views is helpful to its deliberation. Please do not hesitate to contact my office if we may be of further assistance.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: Senator Richard Shelby, Vice-Chairman

AN IDENTICAL LETTER HAS BEEN SENT TO THE HONORABLE PATRICK LEAHY,
CHAIRMAN OF THE SENATE JUDICIARY COMMITTEE

RESERVED

DOJ